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1142
No. 3105

1142
IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY, NA-
TIONAL FIRE INSURANCE COMPANY OF HARTFORD,
INSURANCE COMPANY OF NORTH AMERICA, NA-
TIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURG, PA., SECURITY INSURANCE COMPANY
OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
Second Division.

HON. FRANK H. RUDKIN, Judge pro tem.

JESSE OLNEY,

Solicitor and Counsel for Appellants.

FILED

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F. D. MONCKTON,
CLERK.

Table of Contents.

	Pages
INTRODUCTION	1
STATEMENT OF THE CASE	2
THE PLEADINGS.	
The Bill	3
The Answer	7
THE FACTS	8
Preliminary	8
The Evidence for the Complainants.	
The small fire loss and its strange adjustment....	10
Defendant takes over the stock into his own exclu- sive and sole possession and control	12
His mishandling of this trust fund	13
He forms a hidden partnership to secretly own the trust fund	14
He transfers the trust fund to himself through a dummy	15
He lowers his own bid and makes \$492.....	16
He eliminates competitive bids.....	16
He admits in writing the stock sold to himself to be worth at wholesale three times what he paid for it	16
His immediate personal profits	17
He depreciates the second inventory for his personal gain	17
The evidence of the inventories themselves show he lowered the prices in the second inventory for his own percentage bid	18
The amount of his depreciation of the second in- ventory	20
He conceals from complainants his clandestine acquisition of their property	20

	Pages
His padded expense account	21
His further profits	22
He makes no denial of his frauds	22
He deceives the complainants by his tricky statement, in which he makes no mention that he has become the owner of their merchandise or that he has lumped the stock off to himself	23
His gross inadequacy of consideration on his own purchase	25
He denies his own partnership with Mr. Seynei..	25
Judge Van Fleet's decision puts the complainants on enquiry	25
Isaacs curtly refuses them an accounting.....	26

The Evidence for the Defendant.

His attempt at justification	27
Introduces report of a hired accountant as to his honesty and integrity	27
Withholds from the Court all evidence by which the integrity of his self-serving data could be ascertained and checked up	28
His own daughter knew nothing of his "cash book"	28
He gives himself the lie direct—testifies his own sales slips are short	29
His labor account sophisticated and his own testimony contradictory	30
He fails to explain his bank deposits.....	30

The Rebuttal Evidence for the Complainants.

Isaacs sister-in-law swears she sent him at Seattle from North Yakima \$7,000 in checks, instead of only the \$2,850 testified to by him.....	31
Judge De Lappe of the American Central Ins. Co. testifies Isaacs never had any interview with him in connection with any matters relating to those in litigation	31

	Pages
The complainants directly impeach the defendant's sales slips	32
The articles missing and unaccounted for impeach the sales slips	34
The Decision of the Trial Court.....	35
SPECIFICATION OF ERRORS RELIED ON.....	36-52

ARGUMENT.

PREFACE	54
I. THE VALUE OF THE TRUST FUND	57-75
(a) Isaacs returns grossly inadequate.....	57
(b) The complainants' merchandise was marked and sold by Isaacs on an average of 20% above its wholesale cost prices in the first inventory.....	58
(c) It was a staple stock	60
(d) Bridge's assignee sacrificed it when he sold it in bulk to complainants for \$34,300 cash.....	61
(e) Its actual selling value is shown to be above the prices given in the first inventory	66
(f) Its actual selling value as shown by the books of the defendant's own partnership—Examples.....	67
(g) The actual amount realized by this trustee from the portion of the trust fund transferred to himself in bulk	71
Recapitulation	73
II. THE INSURANCE RETAIL SALE BY THIS TRUSTEE FOR THE COMPLAINANTS	75-87
(a) He claims to have received gross only \$17,800.....	75
(b) Five of his own salesmen give him the lie direct..	76
Mr. Basher	76
Mr. Johnson	76
Mr. Meyer	77
Mr. Seynei	77
Mr. Jeremy	79

	Pages
(c) Mr. Bridge and Mr. Bailey also contradict the defendant's abbreviated returns of only \$17,800....	80
Mr. Bridge	80
Mr. Bailey—Isaacs' own admissions.....	81
(d) The testimony of various experts show the defendant's purported retail returns to be way below the real selling value of the merchandise.....	82
(e) His own partnership books contradict his memorandum "cash book" and its purported sales entries of only \$17,800	84
(f) The trial Court entirely avoided the issue by holding every presumption to be in favor of the defendant and against the cestui que trust.....	86
 III. THIS TRUSTEE'S ACCOUNTING UPON THE TRIAL	 87-142
(1) His so-called "Cash Book", Defendant's Exhibit C..	88
(a) Not a proper book of account by a trustee of a trust fund but in fact a highly sophisticated one and no more authentic than his sales slips	88
(b) Not a complete record.....	88
(c) No one saw its pencil entries of sales but the defendant	89
(d) His "cash book" a Chinese puzzle.....	92
(e) This "cash book" unsupported and evidently adjusted for the purposes of this accounting—"after the suit was commenced and in the face of the litigation itself".....	94
(2) His expense account.....	95
(a) Its items are out of all proportion to the receipts	95
(b) Isaacs corroborates Seynei as to the actual labor expenses being far less than his purported \$1655	96
(c) The Seynei books expose the falsity of Isaacs' expense account	97
(d) Isaacs' own testimony shows his expense account must be padded.....	97
(e) He fails to produce his bookkeeper.....	98

	Pages
(3) His bank statement—Complainants' Exhibit D.....	100
(a) This trustee commingled the trust fund with his own personal funds. His own and his sister-in-law's testimony prove the complainants' monies were not all deposited in the Seattle National Bank but must have been concealed elsewhere	100
(b) His bank account shows a deficit.....	101
(c) He conceals checks available for deposit from his own accountant	103
(d) Isaacs cornered	103
(e) His accountant, Herrick, claims an excess of \$915.54 which he cannot account for from the data offered	104
(4) His sales slips—Defendant's Exhibit D.....	106
(a) He fails utterly to establish the integrity of his sales slips	106
(b) He withholds all evidence by which his sales slips can be checked up.....	106
(c) He fails to account for all the complainants' merchandise—his sales slips are short.....	110
(d) He attempts deception through false figures..	111
(e) Proof of the shortage in his sales slips—example of shortages.....	112
(f) He introduces spurious sales slips.....	117
(g) Complainants' various impeachments of his sales slips	119
(5) Herrick's "purported" report.....	122
(a) This report was prepared upon a wrong hypothesis and false basis, upon insufficient data and upon excluded data which the Court refused to accept or receive in evidence. Its author testifies "it is correct upon the basis upon which it is prepared".....	122
(b) Herrick fails to establish the integrity of Isaacs' sales slips.....	124
(c) Spurious sales slips included in Herrick's "report"	126
(d) Herrick fails to establish the integrity of the "cash book"	127
(e) Herrick's inferences beyond the facts—his "reports" five "statements".....	129
Conclusion	136

	Pages
The Remedy	133
He should be charged as trustee with the value of the trust fund as given in the first inventory.	138
Decision by Judge Van Fleet in a similar case	139
 IV. THE SALE IN BULK	142
Preliminary—The opinion in the lower Court.....	142
(A) THE FACTS	148
After selling one-third of the stock at a three weeks' retail sale to the public, Isaacs closed down that retail sale for the pur- pose of transferring the balance of the stock secretly in bulk at wholesale to himself	148
(1) His misrepresentation	149
(a) There was no necessity of closing down the retail sale	149
(b) The misrepresentation of the stock's value	149
(c) The misrepresentation of its condition..	151
(d) The sale in bulk a frame up and arranged beforehand	154
(e) Mute evidence of Isaacs' own books and handwriting	155
(2) His actual fraud	155
(a) While trustee for the complainants Isaacs schemed to transfer their trust fund secretly to himself.....	156
(b) The evidence shows there were no bona fide bids or bidders at the sale in bulk and that the sale was "fake".....	158
(c) Isaacs' lone tale.....	161
(d) He eliminates competition against him- self as a "bidder".....	163
(e) The trial Court ignored Isaacs' elimina- tion of bidders and depreciation of the second inventory	164
(f) Isaacs drops his own bid and cleans up \$492	165
(g) In writing he admits his purchase to be worth \$24,603.....	165
(h) He conceals his ownership under the name "Harry Seynei".....	167

	Pages
(i) Method by which Isaacs depreciated the second inventory for his individual gain.	168
(j) Mute evidence of the inventories themselves prove this depreciation and corroborate Mr. Seynei and Mr. Jeremy..	171
(k) Explanation of Complainants' Exhibit 19, Report of Klink, Bean & Co.....	172
(l) There were still other methods of depreciation of the inventory employed by the defendant.....	176
(m) His own sales slips prove this depreciation	176
(n) The amount of his depreciation of the second inventory.....	179
(o) The trial Court fails to recollect the evidence	179
(3) His concealment	180
(a) Isaacs' statement to the complaints secretes the fact of the sale in bulk to himself and commissions on his own purchase by making no mention of it...	180
(b) This concealment would have proved successful to date if it had not been for the Seynei suit and Judge Van Fleet's opinion	181
(4) His misappropriation of commissions on his own clandestine purchase.....	181
(a) This trustee cannot claim any commissions on his own purchase and must return upon this accounting the \$2218 withheld from the complainants.....	181
(5) His gross inadequacy of consideration.....	183
(a) While Trustee Isaacs transferred some two-thirds of the trust fund to himself for less than one-third of its actual value.	184
(b) His personal profits	186
(c) His total receipts were \$15,466 more than he paid the complainants for it.....	186
Conclusion—Isaacs' figures and totals false and untrue	187

	Pages
(B) THE LAW	189
V. THE LAW GIVES A BENEFICIARY THE ABSOLUTE RIGHT TO REPUDIATE SUCH A TRANSACTION AT HIS MERE OPTION WHEN APPRISED OF THE FACTS. CITATION OF CASES	189
(a) Isaacs' technical sale to Seynei cannot aid him....	193
(b) Nor does Isaacs' purported "auction" aid him....	193
(c) Isaacs attempts to evade the rule.....	194
(d) Main a complaisant tool and ignorant of Isaacs' frauds	197
(e) Not in the employ of complainants at time of sale in bulk	197
(f) The complainants' position as to Main in this cause.	201
VI. MAIN'S AUTHORITY TO BIND THE COMPANIES CEASED WITH HIS ADJUSTMENT OF THE LOSS BY THE COMPANIES' PURCHASE OF THE MERCHANDISE FROM THE ASSURED FOR \$34,300 CASH.	202
VII. EVEN ON THE HYPOTHESIS OF MAIN'S AGENCY THE SALE IN BULK MUST UNQUESTIONABLY BE SET ASIDE UPON THIS ACCOUNTING UNLESS THIS DEFENDANT PROVES MAIN HAD KNOWLEDGE OF SOME THIRTY SEPARATE INDIVIDUAL FACTS—ENUMERATED	207
The defendant fails to show affirmatively that Main had such knowledge.....	214
(a) Nowhere in the record does Isaacs claim Main had knowledge of his depreciation of the second inventory	214
(b) No conflict in the authorities, yet trial Court held contrary to the established rule.....	216
VIII. ISAACS CANNOT CLAIM THE BENEFIT OF ANY CONTRACTUAL RELATION IN AGENCY AS HE WAS COMMITTING A TORT.....	21
IX. MAIN BY SILENCE COULD NOT AUTHORIZE, RATIFY OR SANCTION AN ACT HE COULD NOT EXPRESSLY AUTHORIZE, SANCTION OR APPROVE. HE COULD NOT PERMIT OR AUTHORIZE ISAACS TO DO WITH THE TRUST ESTATE THAT WHICH HE COULD NOT DO HIMSELF	218

	Pages
X. ISAACS—NOT MAIN—WAS THE AGENT OF THE COMPLAINANTS	222
The rule of presumption of notice to them there- fore does not apply.....	222
XI. ON THE HYPOTHESIS OF MAIN'S AGENCY AND CON- TINUING AUTHORITY EVERY PRESUMPTION IS AGAINST THE COMMUNICATION TO HIM BY ISAACS OF THE FACTS SURROUNDING THE BULK SALE BY ISAACS TO HIMSELF. THE PRESUMPTION IS IN FAVOR OF IGNORANCE RATHER THAN KNOWLEDGE BY MAIN. THE PRESUMPTION IS NOT THAT ISAACS COMMUNICATED THE FACTS TO MAIN, BUT THE PRESUMPTION IS TO THE CONTRARY.....	224
XII. RULE OF OMNIA PRAESUMUNTUR CONTRA SPOLIA- TOREM	226
XIII. THE BURDEN OF PROOF—FIRST SUBDIVISION.....	230
(A) The burden not only of proving affirmatively the agency and powers claimed by the defendant to have constituted the authority of Main, but of the absolute fairness and square dealing of himself as trustee in his every transaction relating to this trust fund, and that the transaction out of which his title at the sale in bulk arose was fair, open and well understood, rests squarely upon the shoul- ders of this defendant.....	230
(B) The defendant confesses he cannot meet this burden	233
XIV. THE BURDEN OF PROOF—SECOND DIVISION.....	236
(A) The District Court erred in its decision in holding and concluding that the statement rendered by this trustee as set forth in the bill of complaint which was forwarded to the companies with his purported “net balance” of \$1049 became an account stated between the complainants and himself as their trustee. The District Court erred in its citation and rule of law on this point to the effect that the burden of proof rested on the complainants: the cases cited being where the fraud or error was apparent upon the face of the account.....	236

	Pages
<p style="padding-left: 40px;">The Cause at Bar. In the present cause Isaacs' statement to the complainants does not reveal his sale in bulk secretly to himself: nor his charge of commissions on such sale: and his fraud upon his fiduciary is not apparent from the closest scrutiny of the account</p>	241
<p>(B) The Correct Rule. "Account stated" cannot be raised by debtor against creditor.....</p>	242
 XV. THE DISTRICT COURT ERRED THROUGHOUT THE TRIAL AND IN ITS DECISION IN HOLDING AND CONCLUDING AND REFUSING TO CONSIDER EVIDENCE OF ACTUAL FRAUD BY THE DEFENDANT AND THEN IN ITS OPINION UPON WHICH THE FINAL DECREE DISMISSING THE BILL WAS ENTERED STATING THE COMPLAINANTS HAD NOT FULLY AND CLEARLY ESTABLISHED SUCH FRAUD.	247
 XVI. THIS TRUSTEE'S PLEA OF THE STATUTE OF LIMITATIONS	248
<p>(a) In California the limitation in actions for an accounting is four years but does not run while the breach of trust is concealed from the principal by his agent</p>	251
<p>(b) Not applicable between trustee and cestui que trust until trustee assumes adverse position with notice to the cestui que trust; before that the statute does not even begin to run.....</p>	252
<p>(c) The complainants' amendment of their bill upon the trial did not change the cause of action.....</p>	253
<p>(d) Equity will not aid an agent who has assumed a position with reference to the business which is antagonistic to his principal.....</p>	255
 XVII. LACHES—FIRST SUBDIVISION	257
<p>(A) The California rule</p>	257
<p>(B) The Federal rule</p>	259
<p style="padding-left: 40px;">The trial court utterly failed to appreciate this relation of trust and confidence in the cause at bar</p>	

	Page
XVIII. LACHES—SECOND SUBDIVISION	261
Nor are the complainants chargeable with constructive notice of any fact relating to their property. In a relation of trust the beneficiary is not chargeable with constructive notice of any fact, actual notice of which should have been given by the trustee....	261
XIX. LACHES—THIRD SUBDIVISION	263
The trustee cannot raise the issue against his beneficiary	
XX. THE FINAL DECREE IN THE TRIAL COURT SHOULD BE SET ASIDE AND ITS DECISION REVERSED.....	265
XXI. IN CONCLUSION	270
The complainants respectfully request a just decree de novo in this Court upon the record.....	270
APPENDIX	

Table of Authorities.

	Pages
<i>Allsop v. Joshua Hendy Iron Works</i> , 5 Cal. App. 229....	251
<i>Arkins v. Arkins</i> , 77 Pac. 256, 258.....	261
<i>Bailey v. Glover</i> , 88 U. S. 342, 348, 349.....	249
<i>Bank v. Austin</i> , 118 Fed. 798	224
<i>Bogert v. Southern Pacific Co.</i> , 244 Fed. 64, 66....	261, 249
<i>Butler v. Prentiss</i> , 158 N. Y. 49.....	218, 231
<i>Bain v. Brown</i> , 56 N. Y. 285, 288.....	192
<i>Burke v. Bours</i> , 92 Cal. 108.....	219
<i>Butler v. Agnew</i> , 9 Cal. App. 328.....	219
<i>Central Imp. Co. v. Cambria Steel Co.</i> , 201 Fed. 818.....	271
<i>Church v. Marine Ins. Co.</i> , 1 Mason 344.....	194
<i>Cook v. Ceas</i> , 147 Cal. 614, 618.....	257
<i>Clark & Skyles on Agency</i> , 2nd Ed. Sec. 485.....	224
<i>California Code of Civil Procedure</i> , Sec. 343.....	251
<i>Cahill v. Superior Court</i> , 145 Cal. 47.....	257
<i>Distilled Spirits case</i> , 78 U. S. 356.....	200
<i>Dimond v. Henderson</i> , 47 Wis. 172, 176.....	229
<i>Employers Liability Assurance Corporation, Ltd. v. Kelly- Atkinson Co.</i> , 195 Ill. App. 620.....	244
<i>Estudillo v. Security Loan Co.</i> , 149 Cal. 557.....	258
<i>Frankel v. Hudson</i> , 82 Ala. 158.....	225
<i>Fargo v. Cravens</i> , 9 S. D. 651.....	222
<i>Gutterson v. Lebanon Iron Co.</i> , 151 Fed. 72, 74.....	231
<i>Gilbert v. Hewetson</i> , 79 Am. St. Rep. 486, 492.....	218
<i>Greenleaf on Evidence</i> , Sec. 74.....	202
<i>Hall v. Gambril</i> , 92 Fed. 38	183
<i>Hudson v. Randolph</i> , 66 Fed. 216.....	224
<i>Harrigan v. Gilchrist</i> , 121 Wis. 127, 235.....	255
<i>Hovey v. Bradbury</i> , 112 Cal. 620.....	264

TABLE OF AUTHORITIES

xiii

	Pages
<i>In re Feldstein</i> , 115 Fed. 262.....	91
<i>Innerarity v. Merchants National Bank</i> , 139 Mass. 332....	225
<i>Insurance Code, State of Washington</i> , Secs. 6059-62.....	203
<i>Jeffries v. Wicster</i> , 13 Fed Cas. No. 7, 254, 436.....	217
<i>Kirby v. Lake Shore Railroad</i> , 120 U. S. 136.....	249
<i>Kilbourn v. Sunderland</i> , 130 U. S. 505, 518, 519.....	259
<i>Kelly v. Boettcher</i> , 85 Fed. 55, 62.....	255
<i>Kerr on Fraud and Mistake</i> , Third (English) Ed. 135....	233
<i>Louisville Trust Co. v. Louisville Co.</i> , 75 Fed. 433.....	224
<i>Lawson v. Beach</i> , 94 Fed. 30.....	224
<i>Le Gendre v. Byrnes</i> , 44 N. J. Eq. 372.....	231
<i>Lessel v. Zillmer</i> , 105 Wis. 334, 339.....	228
<i>Laws of England</i> , by Earl Halsbury, Vol. 1, p. 189, Secs. 404, 406	146
<i>Lazelere v. Starkweather</i> , 38 Mich. 96, 107.....	262
<i>Michoud v. Girod</i> , 45 U. S. 556.....	191
<i>Mt. Vernon Co. v. Wolf Co.</i> , 188 Fed. 168.....	271
<i>Moore v. Petty</i> , 135 Fed. 668.....	256
<i>Manheim v. Standard Fire Ins. Co.</i> , 145 Pac. 992.....	203
<i>Mills v. Goodsell</i> , 5 Conn. 475, 479.....	192
<i>Myers v. Myers</i> , 16 Am. Dec. 648, 658.....	226
<i>McGar v. Adams</i> , 65 Ala. 106.....	182
<i>Mechem on Agency</i> , 2nd Ed., Sec. 1221, Sec. 466, Sec. 723	266, 216, 232, 225
<i>Munson v. Hallowell</i> , 26 Tex. 475, 484.....	249
<i>Manhattan Life Ins. Co. v. 42nd St. Ferry Co.</i> , 139 N. Y. 146	226
<i>Northside Loan Soc. v. Nokelski</i> , 106 N. W. 1097.....	255
<i>Odell v. Cox</i> , 151 Cal. 75	184
<i>Pine Mountain Iron & Coal Co. v. Bailey</i> , 94 Fed. 258, 261	222
<i>Porter v. Woodruff</i> , 36 N. J. Eq. 174, 179.....	189

	Pages
<i>People v. Overysell</i> , 11 Mich. 222, 228.....	192
<i>People v. Hurley</i> , 57 Cal. 146.....	138, 229
<i>Pomeroy Eq. Jur.</i> , Third Ed., Secs. 901, 670, 816 et seq. 965, 959, 964, 1088, 956.....	180, 199, 202, 202, 215-16, 266, 215, 218, 231
<i>Perry on Trusts</i> , Vol. 2, Sec. 863.....	252
<i>Ross v. Payson</i> , 160 Ill. 360.....	263
<i>Reardon v. Washburn</i> , 59 Ill. App. 162.....	193
<i>Rubidaux v. Parks</i> , 48 Cal. 215.....	145
<i>Richmond's Appeal</i> , 21 Am. St. Rep. 101.....	146
<i>Reeves v. Calloway</i> , 78 S. E. 717, 720.....	193
<i>Ryan v. Kahler</i> , 46 S. W. 71, 72.....	183
<i>Sandford v. Embry</i> , 151 Fed. 978.....	92
<i>Seynei v. Isaacs</i> , (U. S. Dist. Ct. unreported).....	138
<i>Saltmarsh v. Beene</i> , 30 Am. Dec. 525, 526.....	194
<i>State v. Edwards</i> , 94 Minn. 225, 229.....	246
<i>San Pedro Lumber Co. v. Reynolds</i> , 121 Cal. 74.....	251
<i>Somervail v. McDermott</i> , 116 Wis. 505.....	230
<i>Smith v. Irwin</i> , 108 App. Div. 218.....	254
<i>Smith v. Seattle, L. S. & E. R. Co.</i> , 72 Hun 202.....	155
<i>Titus & Scudder v. Cairo & Fulton R. R. Co.</i> , 46 N. J. L. Reports 393, 418, 420.....	221
<i>Tate v. Williamson</i> , L. R., 1 Eq. 528, 536.....	143
<i>Tate v. Williamson</i> , 2 L. R. Ch. App. Cas. 55.....	145
<i>Tyler v. Sanborn</i> , 128 Ill. 136, 142.....	208
<i>Tilleny v. Wolberton</i> , 46 Minn. 256, 258.....	231
<i>U. S. Rev. St.</i> , Sec. 721.....	249
<i>Underhill on Trusts and Trustees</i> , 322.....	232
<i>Vanuxen v. New York Life Ins. Co.</i> , 122 Fed. 106.....	242
<i>Wordsworth v. Adams</i> , 138 U. S. 380.....	183
<i>Western Mortgage Co. v. Ganzer</i> , 63 Fed. 647.....	224

	Pages
<i>Whittle v. Vanderbilt Co.</i> , 83 Fed. 48.....	224
<i>Waterloo Mining Co. v. Doe</i> , 82 Fed. 51.....	271
<i>Watts v. White</i> , 13 Cal. 321	147
<i>Wittenbrock v. Parker</i> , 102 Cal. 102.....	199
<i>Wormley v. Webb</i> , 44 Mo. 444, 451	191

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY, NA-
TIONAL FIRE INSURANCE COMPANY OF HARTFORD,
INSURANCE COMPANY OF NORTH AMERICA, NA-
TIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURG, PA., SECURITY INSURANCE COMPANY
OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
Second Division.

Hon. FRANK H. RUDKIN, Judge pro tem.

Requesting Reversal and a Just Decree De Novo in This Court.

This cause comes before the Court on appeal from the United States District Court for the Northern District of California, Second Division, having been tried there before Hon. *Frank H. Rudkin*, temporarily sitting

therein; and is a suit in equity by the *cestui que trust*, various fire insurance companies, against their trustee, a salvage man, for a true accounting of a large stock of merchandise placed in his hands for sale for them and which he has entirely disposed of. Instead of referring the cause to the Master the Court itself proceeded to take the account and upon the conclusion of the trial entered its decree dismissing the bill with costs to the defendant. Appeal is now had from this decree together with the reasons upon which it was based as given in the Court's memorandum opinion, and from various rulings of the Court upon the trial in its exclusion and reception of evidence.

The complainants respectfully ask a just decree *de novo* in this Court.

Statement of the Case.

THE PLEADINGS.

Paragraphs I and II (except last six lines) of the first amended bill of complaint are uncontroverted by the answer save as to amount in controversy and remedy; and the facts therein stated are therefore established as follows:

That the complainants are Eastern Fire Insurance Corporations and that the defendant is a resident of San Francisco, in the State of California.

“That the complainants are and at all the times hereinafter mentioned were fire insurance companies carrying on business individually and through

underwriters in the State of Washington in the United States of America; and on or about the 11th day of August, 1913, were insurers as aforesaid in various proportional amounts of the stock of merchandise of A. Bridge & Co. in the City of Seattle in the said State of Washington. That on or about said date a fire occurred in the said store and merchandise causing a loss. That the assignee for said Bridge and complainants, his insurers, could not agree upon the amount of damage. That the said Bridge stock of merchandise was inventoried at some \$48,000 and after negotiations between your complainants and the assignee of said assured the sound value of the said stock of said Bridge remaining after said fire was fixed at \$34,300. as a compromise between your complainants and the assignee of said Bridge, and your complainants for the said amount purchased the whole of said stock of merchandise from the assignee of said Bridge, their assured. That the defendant contracted *with your complainants* to dispose of this their said stock of merchandise for them, offering to advance them a guarantee of \$18,100 in cash and to take over from them *as their trustee* their said merchandise in its entirety and to sell and dispose of the same for them to the best possible advantage and to return to *them* any and all monies taken in by him for them on such sale over and above his said guarantee and actual expenses. That the *complainants accepted* defendant's said offer and delivered over their said stock of merchandise into his hands to do his best for them on the terms and conditions aforesaid. That the defendant after thus *contracting with the complainants* did actually take over into *his exclusive and sole possession and control* their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned proceeded to sell the same in the said City of Seattle and State of Washington, and sold all of your complainants' said stock of merchandise therein."

and the bill then proceeds; the following quotation likewise remaining uncontroverted by the answer:

“That following said sale and on or about the 26th day of November, 1913, this defendant rendered a statement *to your complainants* of his said operations *as their trustee*, as follows:

“Statement—Salvage of A. Bridge & Co., Clothing, furnishings, shoes.	
Net Sales	\$28,901.92
EXPENSE:	
Rent	\$ 920.00
Light	66.88
Advertising	1204.21
Clerk Hire	1655.21
Materials	90.84
Insurance	34.59
Commission for handling at	
20% on \$28,901.92	5780.38
Advanced as guarantee	18,100.00
	<hr/>
	\$27,852.11 27,852.11

Net Proceeds \$ 1,049.81”

and the bill thereupon proceeds and alleges that the said purported “*net proceeds*” were paid over to the complainants who at the time believed and had no other knowledge nor information of any kind to put them on enquiry to question the said statement or good faith of their trustee; and that the complainants are informed and believe and therefore charge the fact to be that the said statement did not constitute a full accounting by the defendant as their trustee, and that the expense items of said statement “*are excessive and likewise with the totals false and untrue*”; and that the complainants ask discovery by the Court of the entire true expenditures and receipts of their sale.

The bill then proceeds to allege a clandestine sale in bulk by the defendant to himself of the complainants said merchandise, in the following words:

“The complainants further charge and show to your Honors that this defendant, their trustee, sold in bulk secretly to himself without their knowledge or consent the balance of their said stock of merchandise remaining after only three weeks of his said sale for them in the City of Seattle, State of Washington. That knowledge of said sale to himself was not communicated to your complainants at any time by said defendant, and that they only became aware of the same within ten days prior to the commencement of this action. *That said defendant thus sold secretly to himself between one-half and two-thirds of their entire said merchandise, the exact amount of which they are unable to state and ask discovery by this Court.* That said alleged sale to himself was accomplished by only one day’s notice to the public by means of a small advertisement in a newspaper which said time and notice were grossly inadequate to obtain competitive bids. That in fact as your complainants are informed and believe and therefore charge the fact to be, that this defendant, their trustee, thus transferred to himself their said trust fund consisting of their said merchandise, without bona fide competitive bids therefor of any kind or nature whatever; and that upon said sale to himself clandestinely of their merchandise he credited himself and withheld from them upon his said final statement and settlement a sum amounting to 20% of his claimed consideration paid therefor, claiming the same unbeknown to them as commissions upon his own purchase. That said defendant was not entitled to said or any commissions upon his said clandestine appropriation of their merchandise, and they ask and pray a return to them of said monies so withheld in such sum as the Court shall find due.

That said transfer to himself by their trustee was a gross fraud and imposition upon your com-

plainants who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund together with his profits thereon additional in such sum as the Court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale."

The bill then proceeds to show that the complainants had no knowledge of any of the said facts charged in said bill until after the conclusion of a case in the United States District Court for the Northern District of California, Second Division, brought by the defendant's partner against this same defendant to establish a partnership in a portion of the same merchandise which is the subject of this action, wherein the defendant's partner testified the defendant on his sale for the complainants had taken in sums largely in excess of \$28,901.92 claimed by him in his said statement to the complainants to have been the total gross proceeds of their merchandise; and that the fact of such testimony and the facts themselves had not come to the complainants' knowledge until a few days prior to their bringing of the present action to force their trustee to disclose in detail his operation and handling of their trust fund. That the defendant was trusted by them and they believed his representations in his said statement to them and did not discover its falsity until and in the way mentioned; and that they were misled by his said false representations and in ignorance of their falsity accepted as true and made to them in good faith the said misrepresentations of facts contained in his said statement to them,

“That thereafter the fact of the falsity of the said statement rendered them by their said trustee and the fact of the existence of monies so withheld by him from them has been *sedulously* and *fraudulently concealed* by him, said defendant, to the present time”,

and ask discovery by the Court of the amount of excess monies received by their trustee over those acknowledged and a full accounting.

The bill thereupon sets out the complainants' demand upon the defendant for such accounting and his curt refusal; and that they have therefore been forced to bring this suit in equity through his own act; and that they have thus been compelled to employ and become indebted to counsel in this litigation.

The answer alleges that the complainants had knowledge of all the frauds perpetrated upon them by the defendant as their trustee at the time they received from him the statement and purported “net proceeds” set forth above and contained in Paragraph III of the bill; and that his said statement and figures therein are true and correct; and that the complainants have been guilty of laches.

As to the clandestine sale in bulk of the complainants' merchandise by the defendant as their trustee to himself and his commissions thereon, the answer sets up the defense of the Statute of Limitations, Stated Account, and Laches.

The Facts.

Preliminary.

The facts in evidence resolve themselves largely upon the record around three separate individual inventories taken at different times in themselves mutely displaying the history and value of the complainants' merchandise constituting their trust fund in the hands and exclusive control of the defendant as their trustee: these are the

FIRST INVENTORY dated August 18, 1913 (Complainants' Exhibit C) taken immediately after the so-called "fire" of the goods on hand, at the original *wholesale* cost price of the merchandise to Mr. Bridge, amounting to \$45,954.48 constituting the trust fund which came into this trustee's possession and exclusive control; the *retail* value of the merchandise being some \$60,000.

SECOND INVENTORY dated September 28, 1913 (Complainants' Exhibit 4) taken immediately after the 19 days retail sale by the defendant for the complainants and purporting to show the merchandise on hand at its close at the same cost prices as the First Inventory, in the sum of \$24,653.35 Bridge *wholesale* cost prices, and which the defendant admittedly transferred to himself in bulk for \$8,875 wholesale.

THIRD INVENTORY dated November 17, 1913 (Complainants' Exhibit 9) taken after this trustee's purchase in bulk and after he had conducted a seven weeks' retail sale for himself in his partnership of H. C.

Seynei & Co., called the "Seynei Sale", showing the amount of goods on hand at its close, amounting to \$16,633.57.

These three inventories become the three hubs for radiating facts broadly resolving themselves into the following three groups:

THE INSURANCE RETAIL SALE conducted by the defendant for the complainants to the public and lasting only 19 selling days, the First Inventory being used as the basis for the prices on that sale, the retail prices being marked up automatically and sold at an average of 20% *above* the prices for the same articles given in the First Inventory at wholesale. About *one-third* of the complainants' merchandise was sold.

THE SALE IN BULK of the remaining *two-thirds* of their merchandise conducted by the defendant clandestinely to himself for which, for the purposes of his own percentage "bid", he made up the Second Inventory, claiming it to have been taken on the same basis as the First Inventory, i. e. at the original wholesale Bridge cost prices. In fact it was not taken at those cost prices but was depreciated by this trustee some \$6500 or more for his own individual gain.

THIS TRUSTEE'S PERSONAL PROFITS through dishonest manipulation of the trust fund consisting of the complainants' merchandise through concealment of the actual returns of their 19 days retail sale; his depreciation of the Second Inventory; his clan-

destine sale of some \$31,000 of the complainants' merchandise to himself for \$8875; his personal profits thereafter upon this purchase as shown by its sale at retail to the public during his partnership, the Seynei Sale; and the Third Inventory taken at its close on the same basis as the First Inventory; to say nothing of \$2218 withheld by him unknown to the complainants as commissions on his own secret sale to himself of their merchandise in bulk.

THE EVIDENCE FOR THE COMPLAINANTS.

The small fire loss and its strange adjustment.

The stock consisted of men's clothing, furnishings, hats, caps, shoes and rubber goods. The evidence shows there was actually but little damage, that the fire was over in twenty minutes, and did not extend over six feet of floor space, the damage being confined to goods on one or two tables which was some \$500, and that after the fire over *ninety* (90%) per cent of the merchandise was good and undamaged; all showing clearly how these complainants were mulcted upon that loss.

The complainants called in an independent adjuster in Seattle, one George C. Main, who was not in their regular employ nor a salaried employee, to represent them on the adjustment of the loss. Mr. Bridge, the owner of the store, assigned his stock of merchandise to a representative of a Seattle bank to secure the bank for some \$15,000 advanced to him to discount for cash his bills for this same merchandise. His assignee employed one J. R. Mason as adjuster for the bank upon

the loss. An inventory was then taken by Mason called in this cause "The First Inventory" (Complts. Ex. C) showing the original wholesale cost price of the entire stock of merchandise to Bridge, the owner, this inventory aggregating \$45,954.00; which total did not include the freight and discounts which, if added, Mr. Bridge testified would have made the original wholesale cost price to him over \$50,000, and that even *after the fire* its *retail* selling value was in excess of that sum. This inventory included all the merchandise upon the premises, even the badly damaged, and upon the trial was agreed to be correct by all the parties to the cause and the trial Court also so held in its opinion.

Main could not agree with Mason upon the amount of the loss and refused absolutely to pay the amount claimed, taking the other tack of getting the value of the stock down as low as possible with the idea of the complainants buying it in bulk at wholesale and selling it out at retail at a good profit; the final arrangement being thus a compromise of figures only.

Mr. Bridge was not the owner of the building where his business was located but held a lease at a monthly rental of \$920. For the reason that another such monthly payment was about to fall due which would be saved by an immediate adjustment of the loss, and because the creditors of Bridge were pressing for their money, Mason, acting for them, and as a quick compromise after short negotiation sold to the complainants for \$34,300 cash this entire Bridge stock, although he testifies he personally, if he had been allowed to use his own judgment, would never have sold it at that figure,

as the stock at retail should have sold at and above the First Inventory cost prices.

Thus the adjustment of the loss consisted of the buying of the stock from the assured and turning it over to Isaacs—all one transaction. It was part of Isaacs' money that bought the stock; he put up a guarantee of \$18,100, and these companies the balance to make up the \$34,300 paid, the whole thus forming one complete proceeding.

Defendant takes over the stock into his exclusive and sole possession and control.

At the same time the complainants arranged with the defendant to dispose of the stock for them, he advancing this guarantee of \$18,100 and taking over from them as their trustee their said merchandise in its entirety, to sell it to the best possible advantage, and to return to them all monies taken in by him for them on such sale over and above his said guarantee and actual expenses. This offer was accepted by the complainants as they expected to eliminate their loss, otherwise there would have been no object in their purchasing the stock, as an estimated loss is not a complete loss for the merchandise can be reconditioned and sold and the actual loss cut down sometimes 50% and more. The defendant thereupon accepted from Main the keys of the Bridge store and took over from Main the complainants' merchandise "*into his own exclusive and sole possession and control*". Main handed the entire stock over to Isaacs, said he had nothing more to do with it, that it was entirely in Isaacs' hands, that he could do as he pleased, and turned the keys over to the defendant.

His mishandling of this trust fund.

The record shows this trustee's handling of the trust fund thereafter was as follows:

Isaacs opened a sale for the complainants of their merchandise at the same location and in the same store where the fire occurred and conducted a retail "fire sale" there to the public for a period of nineteen (19) selling days from September 5 to September 28, 1913.

This trustee claimed to have taken in only \$17,800 for the complainants on their retail sale. These receipts were *gross*, with an *expense for those 19 days of \$7531.00*

These purported gross receipts *retail* of \$17,800 are 20% *below* the original Bridge *wholesale* cost prices of the merchandise as given in the first inventory. The complainants attacked their trustee's statement to them, by placing on the stand five of Isaacs own salesmen on his retail sale of their merchandise, who were in charge of as many departments on that sale. These witnesses testified that the merchandise was marked and sold at *retail* by Isaacs at prices averaging 20% *above* the *wholesale* cost prices given in the first inventory for the same articles. Two other witnesses, Mr. Bridge, the former owner of the stock, and Mr. Bailey, also together with two of the salesmen, testified to admissions made by Isaacs *before the 19 days retail sale of the complainants closed* that he had *then, already* taken in his guarantee (\$18,100) his commissions (\$3560.00) and expenses (\$3971), and "was on velvet" right then. The defendant however *now* says he took in gross only

\$17,800 which is less than his guarantee of \$18,100. The defendant did not place a single one of his salesmen on the stand to contradict these seven witnesses, nor impeach them in any way.

The auditor of the Seattle National Bank testified that between the dates of the sale this trustee deposited \$20,744.26, while claiming to have taken in on the sale only \$17,800.

The manager of an obscure private banking firm testified that on the day Isaacs opened the sale for the complainants he hired a safe deposit box of them, and visited it on an average of three times a week during the complainants' sale; and this trustee himself on the stand admitted he put money from the complainants' merchandise in that box.

There was much other evidence in detail attacking this trustee's figures which I shall refer to more at length at later pages.

Isaacs forms hidden partnership to secretly own trust fund.

Only *four* (4) days after opening up this sale for the complainants as their trustee, on September 10, 1913, as established by the interlocutory decree by Judge Van Fleet (*Seynei v. Isaacs*, U. S. District Court, Northern District of California, Second Division, In Equity, No. 83), Isaacs formed a secret partnership with Bridge's manager, H. C. Seynei, for the purpose of handling and getting possession of the complainants' stock, this same merchandise, for themselves, in which partnership the defendant was not to be known

as a partner to the public nor to Mr. Main nor to these complainants. The name of this secret partnership was H. C. Seynei & Co., but to avoid the least suspicion the defendant directed that the later business be run under simply the name "Harry Seynei".

He transfers trust fund to himself through a dummy.

For the purpose of getting possession of the stock as actual owner, Isaacs closed down the fire sale Saturday, September 27, 1913, and placed the following small advertisement in the Seattle Times next day, Sunday (Complts. Ex. 17) in the want ad column:

"The balance of the A. Bridge & Co. stock, 103-05 First Ave., Seattle, will be offered for bids Monday, Sept. 29, at 3 p. m. Coast Fire & Marine Insurance Co., D. Isaacs, Manager."

Isaacs then consumed Sunday in taking a depreciated inventory of the balance remaining of the complainants' stock, claiming it to be \$24,653 at Bridge cost prices (though in fact it was some \$31,150 or more) as a basis for his own percentage so-called "bid", and on Monday *morning*, at *eleven* o'clock, instead of three o'clock in the afternoon, he walked out in the store and said glibly "well, boys, the stock's sold to Harry Seynei". The evidence was that there were no bona fide bids or bidders at that sale and that the sale was fake. Both Mr. Seynei and Mr. Jeremy testified they saw no bids or bidders. Isaacs claimed to have paid these companies 45% on his inventory, this second inventory depreciated for the purpose of his own bid, at \$24,653, or \$11,094, from which amount he withheld from these com-

plainants 20% commissions, or \$2218, for selling their merchandise secretly to himself without their knowledge; making the actual cash paid by Isaacs only \$8875, or roughly *one-third* the inventoried cost of the merchandise by the defendant's own depreciated inventory.

He lowers his own bid and makes \$492.

The evidence shows that Mr. Seynei personally never put in a bid nor offered a bid but that Isaacs prepared one for him at 47% (*a carbon copy of which is in evidence; Complts. Ex. 2) and when he found things were going smoothly dropped it down to 45%, thus directly depriving these complainants to the benefit of their trustee of the sum of \$492, as they were entitled to the best price he could get for their property.

He eliminates competitive bids.

Mr. Seynei testified that he never paid a cent of the money; that he was not in reality the purchaser; but that he was used as a dummy by the defendant for the purpose of Isaacs acquiring secretly the complainants' merchandise without their knowledge as its owners. Isaacs asked him to speak to his friends not to interfere so Isaacs could get the stock, with the result that there were no bona fide competitive bids.

He admits in writing the stock sold to himself to be worth at wholesale three times what he paid for it.

That same Monday evening Isaacs and Mr. Seynei sat down together at the Hotel Herald in Seattle and the defendant wrote down in his own handwriting the merchandise amounts in the various departments

* Herein p. 165.

to open up business for their secret partnership, footing up the merchandise at \$24,603.39, together with instructions to his partner Seynei as to what to do (Complts. Ex. 16*) and said "that merchandise is worth one hundred cents on the dollar".

The following day Isaacs opened up the books of their partnership of H. C. Seynei & Co. (Complts. Exs. 5-6-7), and credited himself with a payment of \$11,094 to these complainants, and debited the firm with \$24,653 worth of merchandise, and compelled Mr. Seynei, as the resident partner, to do business on that basis.

These entries appear as follows:

In the Ledger, Complainants' Exhibit 7, at pages 4, 6, 7, 8, 10, 12, 13, 14, 16.

His immediate personal profits.

The proof thus shows that the defendant as trustee thus made a neat personal profit of \$2218 against his firm, and of \$2218 secret commissions against these complainants, or \$4436 in all before he sold a single article at retail; his profits by sales of the articles themselves will later appear in detail.

He depreciates the second inventory for his personal gain.

Isaacs' methods of thus depreciating the inventory on his secret sale in bulk to himself was explained in detail by H. C. Seynei and John Jeremy (Tr. pp. 53-54-56-57-78) who were present at its taking under Isaacs' instructions, and whose testimony is corroborated by the testimony and exhibit (Complts. Ex. 19) of Klink, Bean & Co., as follows: that upon the taking of this

* Herein p. 166.

second inventory, under Isaacs' directions some of the best merchandise was laid away in the balcony and the remainder of the stock was made to look as cheap as possible; the clothing was tied up in bundles with old string; the high-priced goods were mixed with the low-priced and bunched in lots; and the *high-priced goods were entered in this inventory at prices far below the original Bridge cost prices* as written on the sales tags.

The second inventory in evidence (Complts. Ex. 4) corroborates this testimony that the complainants' merchandise was entered therein by their trustee *in lots* and was not taken piece by piece as in the first inventory, undisputed as being fairly taken at Bridge cost prices, and which included all the merchandise on the premises.

Mr. Seynei testified that \$24,653 did not represent the true and correct cost of the merchandise, and that this second inventory made by the defendant did not therefore represent and *was not taken* at Bridge cost prices. The proof also shows that Mr. Main had no knowledge of this depreciation as he states repeatedly he understood perfectly this second inventory was taken at Bridge cost prices (Tr. p. 122) that there was no depreciation on account of damage, and that it was taken on the same basis as the first inventory.

The mute evidence of the inventories themselves shows he lowered the prices in the second inventory for his own percentage bid.

The second inventory was taken for the purpose of Isaacs' own percentage bid. Its depreciation as sworn to by both Mr. Seynei and Mr. Jeremy was corroborated

and established by the evidence of Messrs. Klink, Bean & Co. chartered public accountants, produced upon the trial by the complainants, and the Complainants' Exhibits 18 and 19. The latter reproduced herein*, comparing departments of merchandise in the first inventory (Plffs. Ex. C) with similar departments in this second inventory (Plffs. Ex. 4) exposes the fact that after conducting a three weeks sale *there were more articles of a similar kind at a given price in the second inventory than in the first; for the stock remained the same without the addition of new goods.*

For instance: In the first inventory there were 152 pairs of pants costing \$2.50 each. In the second inventory taken after a sale of three weeks, there were 354 pairs of pants costing \$2.50 each; in other words, there were 202 more pants at \$2.50 on hand after the sale than there were at its beginning. This exhibit showed prices were altered and must have been lowered, as an expert buying merchandise *would not raise prices on himself*; and in addition the *high-priced pants* in the second inventory are mostly missing.

Another instance: In the first inventory there were two mackinaw coats costing \$3.25. In the second inventory there were 21 mackinaw coats costing \$3.25, or in other words, *there were nineteen more mackinaw coats at \$3.25 on hand after a sale of three weeks than at its beginning.*

The first inventory shows that \$3.25 represented the *lowest price* mackinaw coat in the store; so that the price on the nineteen excess coats must have been low-

* Herein p. 172.

ered from the higher-priced ones (*for there was nothing from which they could have been raised*).

This exhibit and Mr. Klink's testimony showed that these excesses occur continually throughout the departments.

The defendant in no wise contradicted the fact that this second inventory taken by him for the purpose of buying in the stock and on which he placed his percentage bid *did not represent* the Bridge cost prices as he claimed, but was greatly depreciated by him, whereby he cheated these complainants out of thousands of dollars.

The amount of his depreciation of the second inventory.

Mr. Klink testified that upon the basis shown by the testimony of five of the defendant's own salesmen upon the insurance retail sale, that upon that sale by Isaacs the stock was marked and brought a 20% average above Bridge cost prices, the depreciation of this second inventory by the defendant amounted to \$6500.

He conceals from complainants his clandestine acquirement of their property.

Mr. Seynei testified that this partnership of H. C. Seynei & Co. was never known to the public, nor was it known that Isaacs had any interest in the stock, but the business was run and advertised under the name "HARRY SEYNEI"; the newspaper advertisements beginning with the picture of Mr. Seynei and ending with statements over his name. These advertisements are

in evidence (Complts. Exs. 11-13-14-15) together with the originals before the Court, and were placed in the paper and the business so run by Isaacs' express direction, and Isaacs said to him: "he didn't want the companies nor Main to know he was the owner of the stock".

After this sale in bulk by Isaacs to himself and then by himself to his firm of H. C. Seynei & Co., a sale for the benefit of that firm was opened right up at the same location, in the same store, at the same rental, with the same merchandise, with the addition at the start of a few hundred dollars of fresh goods. The sale was conducted for *seven weeks* right along under the same conditions as the previous three weeks retail sale for these complainants, with small purchases of new goods from time to time to fill in, aggregating in all less than \$6000, which new goods were marked at a profit of $33\frac{1}{3}\%$ above cost.

His padded expense account.

Under practically the same conditions, this trustee's books of his partnership of H. C. Seynei & Co., and their summary by Klink, Bean & Co. (Complts. Ex. 18) show that it cost him only \$3133.00 to do business for himself for the full *seven weeks*, while his statement set forth in the complaint (Tr. p. 5) shows it cost him for *three weeks* \$3973.60 to do business for them. In other words he did business for himself at \$877 less per week than he did business for his principals.

His farther profits.

The defendant's partnership books of H. C. Seynei & Co. and their summary by Klink, Bean & Co. (Complts. Ex. 18) show that this Bridge merchandise alone on this partnership sale for Isaacs' firm brought 10% or \$1262.40 above its Bridge inventory cost. After this Seynei sale closed the remaining stock was inventoried at \$16,633.57 (Complts. Ex. 9) original cost prices and was sent to San Francisco and was sold there. Judge Van Fleet placed the value of this portion of the stock at inventory prices of \$16,633.57.

The total receipts for the entire Bridge stock purchased by this trustee in bulk were \$15,466 more than he paid these complainants for it.

He makes no denial of his frauds.

Upon the trial the foregoing facts remained substantially uncontroverted by the defendant, including his depreciation of the second inventory (*upon which subject he remains stone dumb*) but asserts he told George C. Main the independent adjuster on the original loss, about the sale in bulk, and therefore is immune from attack claiming Main to have been a general agent of these complainants, and that his alleged communication of the facts to him was communication to them, though apparently not until after the final statement rendered by Isaacs to the complainants. The defendant produced no proof of Main's agency, nor offered nor introduced in evidence any testimony showing Main had knowledge of his frauds nor the depreciation of the

second inventory nor of the fact that it was *not* taken at the original Bridge cost prices.

Main rendered his bill September 8, 1913 (Tr. p. 235), to the complainants for his services on this loss, and was paid. The record shows no further authority or further charges or payments thereafter. Main himself claimed no further authority or instructions than those of an adjuster on the original loss, and said he turned the merchandise over to Isaacs and had nothing more to do with it. Isaacs was the complainants' agent, not Main. Isaacs arranged the sale in bulk while Main was out of town, and Main says his only knowledge of it was hearsay, and that he did not examine the stock at that time nor any reports or records of Isaacs at any time; and that Isaacs' sales slips were not sent to him as a daily report; he never saw them, nor had anything to do with them, nor had any knowledge of them, but that Isaacs used to come up and use the adding machine in Main's office for his own purposes.

Isaacs deceives the complainants by his tricky statement in which he makes no mention that he has become the owner of their merchandise or that he has lumped the stock off to himself in bulk.

After the defendant's seven weeks' partnership sale, the Seynei sale, the remainder of the stock was inventoried in the third inventory amounting to \$16,633, (Complainants' Exhibit 9), and was brought by Isaacs to San Francisco, from which city he sent to Seattle to be mailed from there back to San Francisco again (Tr. p. 5) to the complainants here (a peculiarly *Isaacian* method) the following brief statement of ten lines covering his entire handling of the trust fund:

“Statement—Salvage of A. Bridge & Co. Clothing, furnishings, shoes.		
Net Sales		\$28,901.92
Expense:		
Rent	\$920.00	
Light	66.88	
Advertising	1,204.00	
Clerk hire	1,655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling		
20% on \$28,901.92	5,780.38	
Advanced as guarantee	18,100.00	
	<hr/>	
	\$27,852.11	27,852.11
		<hr/>
Net proceeds		\$1,049.81”

The foregoing statement to the complainants gave them no information of the sale in bulk to himself as their trustee nor his secret commissions on his own clandestine purchase nor information that his sale in bulk to himself was on a false and depreciated inventory prepared by him for the occasion. The five Pacific Coast managers of the complainants testified they had no knowledge of any of these matters nor of any matters not contained in the statement, which regular on its face was accepted in the due and regular course of business.

Upon the trial the defendant claimed that because he thus sent the foregoing statement to Seattle to his friend Main, there to be forwarded through him to the companies here, that such roundabout procedure estops them from enquiring into matters not appearing upon the face of his statement and thus deliberately concealed from these complainants by him.

His gross inadequacy of consideration on his own purchase.

For merchandise inventoried at \$45,954, complainants received only \$19,194 from this trustee.

The evidence shows that the complainants paid \$34,300 for the original stock which was inventoried at cost price at \$45,954 and which inventory included all the merchandise at its original cost; that is, they paid cash 75% of its original cost, as against their trustee's payment to them of 35% (his bid being 45%, on which he withheld 20% commission, making 35% net). This trustee thus clandestinely transferred to himself about two-thirds of the same merchandise for 40% less than the *cestui que trust* had paid cash for it four weeks before.

He denies his own partnership with Mr. Seynei.

After using Seynei as dummy throughout these proceedings and making him believe he was a partner, the defendant then, after reaching San Francisco, refused, as in the case at bar, to give his fiduciary an accounting, and Mr. Seynei came down to San Francisco, and began an action in the U. S. District Court for the Northern District of California, Second Division, numbered in equity eighty-three, to enforce his partnership and for an accounting, which after some ten days in Court and before the Master was settled by the defendant after decision by Judge Van Fleet but before formal entry of judgment.

Judge Van Fleet's decision puts the complainants on enquiry.

On the trial of this Seynei suit Mr. Seynei testified that the sums stated to the complainants by this

defendant to have been all he received, were grossly inadequate and that Isaacs had received other sums far in excess of the amounts he had represented to the companies as having been all he had taken in. These statements made by the defendant's partner under oath coming to the attention of the complainants, together with the formal decision* of Judge Van Fleet roundly scoring the defendant as a swindler, they at once demanded a full and detailed accounting of the defendant as their trustee, which he refused.

Isaacs curtly refuses them an accounting.

Mr. Sandford H. Horne testified that he was present when specific demand was made by the complainants upon the defendant for an accounting and of his curt refusal "they'll get no accounting from me". There was no attempt at contradiction by the defendant.

The present equity suit was thereupon filed seeking from this trustee a full and true accounting from him of the trust fund which he has entirely disposed of.

The complainants urged upon the trial that their trustee should be at least charged with the amount of the first inventory, showing the merchandise which came into his hands.

* Herein pp. 139, 140, 141.

THE EVIDENCE FOR THE DEFENDANT.**His Attempt at Justification.**

Introduces "report" of a hired accountant as to his honesty and integrity.

This trustee in support of the allegations of his answer and his statement and figures rendered the complainants as set forth in the bill, went upon the stand and testified in his own behalf that these figures were correct, and introduced over complainants' objections another statement or so-called "report" by Lester Herrick, an accountant in the employ of one of defendant's counsel, to the same effect, and letter perfect in even certifying to Isaacs' own honesty and integrity; this "report" being based upon self-serving data furnished Herrick by the defendant weeks before the trial and without reference, as Herrick himself testified, to the facts and evidence produced by the complainants upon the trial, and which Herrick says were not taken into consideration by him. This data was some loose-leaf sales slips without the production of anything therewith by which their accuracy could be checked, and claimed copies of original receipts and other documents, no originals being produced or their absence accounted for, and a small lone "record book", containing a few entries in pencil of the proceeds of this \$60,000 trust fund, the balance of the book being taken up with like entries of other business enterprises extraneous to the case; this "record" book being the only book of account (if it may be called such) produced by the defendant upon the accounting and of which Herrick said it was not a complete record.

Withholds from the Court all evidence by which the integrity of his self-serving data could be ascertained and checked up.

The defendant thus produced in evidence some 10,000 loose-leaf sales slips purporting to be all the sales slips from this retail sale, footing up approximately the amount he claimed to have received for these complainants, but withheld or did not produce their salesmen's indexes, adding machine totals and cash register totals and original merchandise sales tags, by which alone the accuracy of the sales slips produced could be checked and determined, and which, as his witness Herrick testified, constituted the chief audit and check by which their correctness could be ascertained and which are customarily preserved in every well regulated institution and without which he had no way of determining if all were there. No evidence or explanation was vouchsafed by the defendant for their non-production, although his own witnesses testified and Isaacs himself that these had been obtainable and were used upon the sale.

Herrick testified he did not check up the individual sales slips as there was nothing to check them up with, and that some might be missing. The record also discloses that the entries in the "cash book" did not include money taken out or not put in the cash drawer during the day and that neither the cash book nor the sales slips were a complete record.

His own daughter knew nothing of his "cash book".

Isaacs' own daughter, Mrs. Cohn, the only other witness besides Herrick and himself, said she helped

during the complainants' sale, but did not compare the daily totals of the sales slips with the cash entries at the time and so did not know whether they corresponded or not.

He gives himself "the lie direct"—testifies his own sales slips are short.

Regarding these sales slips Isaacs himself testified that he did not instruct his witness Herrick, the expert accountant, to tally up the articles on these sales slips with the first and second inventories, whose differences would show the number of articles actually sold, but that *he did that himself*; but even by *doing it himself*, the figures themselves, which he gave the Court as the totals of these slips, proved these sales slips to be incorrect in that they showed he had sold less articles than he should account for, and that therefore these sales slips produced were not all and that many had been withheld from the Court, or else those produced proved conclusively his depreciation of the second inventory preparatory to his clandestine transfer of the stock in bulk to himself.

For instance, Isaacs testified the sales slips produced by him showed in comparison with the differences between the first inventory taken immediately *before* his sale at retail for the complainants and his second inventory taken immediately after closing down that retail sale, (the difference between them representing the number of articles sold by him on the retail sale) that "the pants show that there are 64 pair short of what I received"; also that there was a

shortage in the shirts, underwear, socks, handkerchiefs, mufflers, gloves, mittens.

Isaacs' own statements on the stand show that in computing the number of articles which were sold under seven separate headings (such as suits and pants) from the sales slips they fell short in five of those instances out of the seven, and that in these few instances alone *over five hundred articles are missing and unaccounted for*. These instances represent only a small part of the entire merchandise that was sold, and also only a small part of the articles missing.

In reality the sales slips produced by the defendant show sixteen hundred and twenty-five (1625) articles missing and unaccounted for, being one-twelfth (1/12) of the total number of articles sold.

His labor account sophisticated and his own testimony contradictory.

This trustee testified as to his expense account of the retail sale that his labor for the first week was \$270, or \$1655 for the entire three weeks; which would make the labor average for the second and third weeks over \$600. Thus he testified to increasing his labor *threefold*, at the same time saying that the sales fell off to such an extent that he was obliged to close the retail sale and buy the stock himself.

He fails to explain his bank deposits.

This trustee also testified to having commingled the trust funds of the complainants with his own personal

funds in the Seattle National Bank, and in order to explain his total of \$20,744 bank deposits during the complainants' sale while claiming to have taken in only \$17,800 (and to have deposited of this only \$15,978.72) produced four checks from a sale he was conducting coincidentally at North Yakima in the State of Washington aggregating \$2850.00, claiming this amount having been sent down to him at Seattle from his manager at North Yakima and having been deposited in the Seattle National Bank.

THE REBUTTAL EVIDENCE FOR THE COMPLAINANTS.

Isaacs' sister-in-law swears she sent him at Seattle from North Yakima \$7000 in checks, instead of only the \$2850 testified to by him.

The complainants then in rebuttal placed on the stand the defendant's own sister-in-law, Mrs. Benzoin, who testified she managed the sale for him at North Yakima, and that during the insurance retail sale by him for the complainants she sent down to Isaacs at Seattle some \$7000 in checks instead of only \$2850, as testified to by the defendant; which showed either that the defendant had another bank account or used his safe deposit box to keep secret the moneys withheld by him from the complainants.

Mr. De Lappe of the American Central Insurance Company testified that Isaacs never had any interview with him in connection with any matters relating to those in litigation.

The complainants directly impeach the defendant's sales slips.

The complainants directly impeach their trustee's unchecked sales slips and accountant's "report" and his self-serving figures and statements, showing he disposed of their merchandise at 20% *below* the original Bridge inventory cost prices (Plffs. Ex. C), that is that he sold for \$17,800 stock inventoried at \$21,301 cost prices, by the evidence of five of the defendant's own salesmen on his retail sale for the complainants, as follows:

Mr. Seynei, who managed the sale for Isaacs; Mr. Jeremy, who as an employee of the defendant had charge of the clothing department; Mr. Basher, who as an employee of the defendant was in the shoe department; Mr. Johnson, who as an employee of the defendant was in the clothing department; and Mr. Meyer, who as an employee of the defendant had charge of the furnishings; all of whom were so employed during Isaacs' entire retail sale for the complainants and who testified that upon that retail sale the stock sold at an average of about 20% *above* the original Bridge inventory cost prices (Plffs. Ex. C), and that that retail sale was a great success.

The defendant produced not a single salesman to controvert this testimony except his own unsupported word.

In addition the complainants called Mr. Bridge, the original owner of the stock and store, who testified to Isaacs' statements to him to having taken in his entire guarantee, expenses and commissions, *before*

the close of the sale at retail for the complainants; and as to how the merchandise itself was marked and sold above cost from the witness's own personal observation; also the testimony of Mr. Jeremy as to the defendant's statement made openly to himself and others *before* the retail sale closed down that he was "on velvet" right then; and the testimony of Mr. Seynei that before the retail sale closed Isaacs had stated it was a great success, that it had gone way beyond his expectations; and that he had taken in his entire guarantee and expenses, and was on velvet; that he would now get the balance of the stock and make plenty of money.

In addition also the testimony of Mr. Bailey who particularly described Isaacs' admissions to him personally to the same effect during the progress of that retail sale for the complainants, that he had then already taken in *before that retail sale closed and before the sale in bulk to himself* his entire guarantee, commissions and expenses and was on velvet right then; and to the fact of the sale being a highly successful sale and the biggest at that time Seattle had known, and of the conditions and crowds surrounding it.

In addition also the complainants introduced in evidence some of the actual sales *tags* themselves (Complts. Ex. 1) of Isaacs' sale for them, showing the prices at which some of their merchandise actually sold above the Bridge cost prices, and thus corroborating the five salesmen against the defendant's unsupported word.

And in addition the testimony of Mr. Seynei and Mr. Jeremy as merchandise men and Mason and Main as adjusters, that as a fire is a big drawing card, a fire sale increases the value of a retail stock of merchandise over an ordinary sale anywhere from 25% to 50%, thus corroborating the salesmen as to the merchandise having been marked and sold by the defendant *above* the original cost prices in the first inventory.

Also in addition the complainants further impeached the defendant's sales slips by introducing in evidence the books of Isaacs' firm of H. C. Seynei & Co. (Complts. Exs. 5-6-7) and the summary of the same by Klink, Bean & Co. chartered public accountants (Complts. Ex. 18), showing that the "fag end" of this same stock, after the three weeks' insurance sale of the best of it, even brought 10% *above* the original Bridge inventory cost prices as shown by the first inventory (Plffs. Ex. C), upon the sale for his firm after his transfer to himself of the stock in bulk.

The articles missing and unaccounted for impeach the sales slips.

Further the defendant impeached his own sales slips by testifying that the articles sold as designated by these sales slips *fell short* of the actual number sold as determined by the difference between the first and second inventories.

This trustee also impeached the selection of sales slips offered the Court through his failure to produce

and offer in evidence with them their salesmen's indexes, their adding machine, and their cash register totals by which alone their accuracy could be checked and their integrity determined. He offered no excuse for their non-production though the evidence showed they were made and used upon the complainants' retail sale.

And Mr. Jeremy in his testimony showed how the salesmen's indexes are a check on the cashier or manager as well as on the salesmen, and testified how a dishonest manager or trustee could destroy any number of sales slips and how without their salesmen's indexes there could be no discovery.

The sales slips produced *impeach themselves*—as many of them bear other dates than those of the complainants' sale, and many are undated.

THE DECISION OF THE TRIAL COURT.

The District Court held that the defendant had fully accounted in every way upon the trial; that the burden of proof rested upon the complainants rather than upon their trustee, even though he had benefited personally by his handling of the trust fund; that the complainants had failed to sustain this burden of proof; that the complainants had not impeached defendant's sales slips; that the said account rendered them by their trustee had become an account stated and could not be opened despite the arrant frauds shown;

and that anyway the complainants were bound by the alleged knowledge of George C. Main, an independent adjuster of the frauds of the defendant, though such knowledge by Main was not proved or brought home to him upon the record, and that though no authority to Main to bind the complainants beyond his authority as an adjuster under the Washington statutes had been shown, such authority could be presumed; and that the statute of limitations had run against the complainants and that they had been guilty of laches; and, upon these assumptions unsupported by the evidence, entered its decree summarily dismissing the complainants out of Court with costs to the defendant.

Specification of Errors Relied On.

I.

Because the District Court erred in its decision in refusing to accept the rule that the strictest interpretation of the law must be invoked against a trustee who has refused to account to his beneficiary and that the most rigid rule of calculation which the law affords should be followed in behalf of the *cestui que trust* as a substitute for such omission.

II.

Because the District Court erred in its decision in holding and concluding every presumption throughout to be in favor of the trustee and against the

cestui que trust, as every presumption should have been held and determined in favor of the latter, the trustee admittedly having derived a personal profit from the transaction.

III.

Because the District Court erred in holding and concluding that the burden was not upon the defendant as the trustee of the complainants to render them a proper accounting.

IV.

Because the District Court erred in its decision in holding and concluding that concealment or unfairness do not necessarily entitle a principal to a judgment avoiding a sale by such agent to himself of the principal's property; and in so deciding the Court disregarded a fundamental rule of equity.

V.

Because the District Court erred in refusing to consider the great preponderance of evidence of a dozen witnesses not parties to the cause against the single self-serving declarations of the trustee testifying for himself.

VI.

Because the District Court erred in its decision in not charging the trustee with the full value of the trust fund in his hands, he having entirely disposed of it and having commingled its proceeds with his

own personal funds and merchandise and kept no separate account of either nor proper books of account.

The Court erred in not requiring him as trustee to return to the complainants the amount of this principal (\$45,974) as per the first inventory (Plffs. Ex. C) plus his profits thereon, with interest, less the amount he has already paid.

VII.

Because it was the duty of this defendant Isaacs as trustee for the complainants to have frankly informed his fiduciary of all the circumstances surrounding his secret sale in bulk to himself of their merchandise; and his failure to perform that duty was active concealment and constituted fraud; and the District Court erred in its decision in not so holding and concluding.

VIII.

Because the District Court erred throughout the trial and in its decision in holding and concluding and refusing to consider evidence of actual fraud by the defendant and then in its opinion upon which the final decree dismissing the complaint was entered stating the complainants had not fully and clearly established such fraud.

The Court doubly erred for it was not necessary for the complainants to prove nor for the Court to find expressly that the acts done by this trustee were

done with a fraudulent and wrongful intent; because his acts themselves as disclosed by the evidence were of such a character, considering the fiduciary relationship of the parties, that the law imputes fraud.

IX.

Because the District Court erred in its decision in holding and concluding that the defendant as a trustee commissioned to sell and being himself the purchaser through another (Seynei) secretly of the property of his principals, the complainants, could recover commissions from them on such sale in bulk to himself without their knowledge.

X.

Because this defendant upon such sale in bulk having withheld \$2218 from the complainants without their knowledge for secretly selling to himself for \$8,875, net, merchandise valued at cost price \$31,153, and figured by himself in his own handwriting (Plffs. Ex. 16) at \$24,603.39, should have been held to return these commissions to the complainants upon this accounting; and the District Court erred in its decision in not so holding and concluding and charging this trustee upon this accounting.

XI.

Because the evidence shows that Isaacs, this defendant, while trustee for the complainants, sold their merchandise secretly to himself for \$8875 net. Within

a few hours afterward he sold the same identical merchandise to his firm of H. C. Seynei & Co for \$11,094. This personal profit of \$2219 on their merchandise belonged to the complainants and not to Isaacs, their trustee, and the District Court erred in not so holding and concluding in its decision and charging this defendant therewith upon this accounting.

XII.

Because the evidence showed the total net receipts from the entire second inventory of Bridge stock were \$15,468 more than Isaacs, their trustee, paid the complainants for it; and the District Court erred in not so holding and concluding in its decision and charging the defendant therewith upon this accounting.

XIII.

Because the District Court in its decision in not considering the mute evidence of the defendant's own figures in his own handwriting (Plffs. Ex. 16) as to the actual value (\$24,603) of the merchandise in bulk, this trustee claimed to have sold fairly to himself for \$8875 erred in not holding and concluding in its decision the said sale in bulk to himself clandestinely by this defendant to have been for an inadequate consideration, viz., one-third, as shown by the figures of the defendant in his own handwriting and by his admissions to Mr. Seynei regarding those figures; and the District Court erred in not setting aside the said sale in bulk as prayed for by the complainants.

XIV.

Because relative to this secret sale in bulk by Isaacs while trustee to himself, the District Court erred in holding and concluding that this defendant was empowered thus to sell the complainants' merchandise in bulk to himself without their full knowledge of all the facts as his principals; and that he could not be held accountable to the complainants for the personal benefits and profits he derived therefrom.

Because the District Court refused to consider the books of Isaacs firm of H. C. Seynei & Co. in evidence showing that whereas the defendant as trustee for the complainants sold the best of their merchandise on the fire sale for them at a loss of some 20% below their inventoried cost; he sold the remainder, after the secret sale in bulk to himself, the "fag end" for himself at a profit of 10% above their inventoried cost; both being based upon the original Bridge inventory cost as shown by the first inventory (Plffs. Exhibit 'C'), stipulated to be correct by all parties.

XV.

Because as this sale in bulk to himself by this trustee was attended by gross irregularity; and collusively conducted for the benefit of this trustee against the interest of the complainants, and the merchandise sold thereon to himself at a greatly inadequate consideration; the District Court erred in its decision in not so holding and concluding and setting aside the said sale in bulk as prayed for by the complainants and charg-

ing the defendant upon this accounting with the full inventory cost price at least of the complainants' merchandise (\$31,153), or at least with the amount of his own depreciated inventory for his sale to himself in bulk (\$24,653).

Because the District Court erred further in not charging this trustee in addition upon this accounting with his profits on the complainants' merchandise made by him thereon after his transfer in bulk to himself, as shown by the Seynei books in evidence.

XVI.

Because the District Court erred in its decision in refusing to consider and neglecting to refer to the summary in evidence (Plffs. Exhibit 19) of the chartered public accountants, Klink, Bean & Co., irrefutably showing the raw depreciation of the inventory taken by the defendant for the purposes of his own percentage bid for sale in bulk to himself of the complainants' merchandise; a depreciation of the trust fund in his hands of \$6500 for his own personal gain; and the fact that these figures of this exhibit are iron clad in their absolute corroboration of the evidence of Mr. Seynei and Mr. Jeremy of the willful depreciation of the inventory by this trustee, and of his statements made upon its taking.

This one exhibit alone was sufficient to compel the District Court to give judgment for the complainants in a sum at least equal to the total of the depreciated inventory. It proves beyond question the raw

depreciation of this second inventory by this trustee for his own advantage to the detriment of the complainants.

XVII.

Because the District Court erred in its decision in holding and concluding and in its opinion saying:

“I do not understand the correctness of the second inventory was impugned aside from the claim that the cost price of some of the goods was marked down.”

XVIII.

Because the District Court upon this wrong hypothesis above and its conclusions of law thereon erred in holding and concluding in its decision that there was no clear or satisfactory proof by the complainants, and in stating in its opinion that there was some testimony tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid but that the Court was not prepared to say that fact had been established.

XIX.

Because the District Court erred in its decision in holding and concluding that

“the utmost the complainants could claim would be to call upon the defendant to account for the amount of his bid, viz., 45% of the cost price.”

XXI.

Because the District Court erred in its decision in holding and concluding that George C. Main, an independent insurance adjuster and not in the regular employ of the complainants, had authority to represent or bind them after his adjustment of the fire loss for them with the assured by their purchase of the stock of merchandise from the assured for \$34,300 cash.

XXII.

Because the District Court erred in its decision in holding and concluding that the authority of an adjuster lies in contract. In the State of Washington the authority of an adjuster is purely statutory there and defined by the codes. The complainants conferred no authority on Main except that conferred by the Washington statute which defines the authority of an adjuster within the state.

XXIII.

Because the District Court erred in its decision in holding and concluding that further authority from the complainants to Main must be presumed after his adjustment of the Bridge fire loss for them through their purchase of the stock.

XXIV.

Because the District Court erred in its decision in holding and concluding and saying in its opinion

that the complainants were not represented at all if not by Main.

This is conclusively determined by the pleadings. The first amended bill of complaint, Paragraph II, expressly sets forth that the defendant did “actually take over into *his exclusive and sole possession and control* their said stock of merchandise.” There is no denial by the answer nor is the allegation controverted anywhere. Isaacs’ contract under the pleadings was with the complainants direct and Main had no authority whatever over the stock in the defendant’s hands.

XXV.

Because the District Court erred in its decision in holding and concluding that the defendant rendered his statement to Main.

XXVI.

Because the District Court erred in its decision in holding and concluding that Main was fully cognizant of all the facts relating to the sale in bulk by this defendant to himself as the complainants’ trustee.

XXVII.

Because the District Court erred even on the hypothesis of Main’s agency in holding and concluding that he had full knowledge of all the matters set forth in the preceding assignment sufficient to bind and estop these complainants from a full recovery in the present cause.

XXVIII.

Because the District Court erred in holding and concluding that an agent (if Main be taken to be one after the adjustment of the loss) could, by his silence, authorize, ratify or sanction an act he could not expressly authorize, sanction or approve; for the reason that Main, upon such hypothesis was an agent, a trustee of an express trust, and he could not permit or authorize Isaacs to do that with the trust estate which he could not do himself; and it was a perversion of the law for the District Court to so hold.

XXIX.

Because the District Court in holding in its decision and concluding that this defendant could claim the benefit of any contractual relation in agency while committing a tort, erred and disregarded one of the fundamental principles of equity.

The defendant is shown by the evidence in the commission of a tort (the lowering of his bid on sale in bulk to himself, his depreciation of the second inventory for the purposes of his percentage bid while trustee against the interest of the *cestui que trust*, his instructions to his salesmen upon its taking, his forming his secret partnership to conceal from his fiduciary his connection with their property and ownership of it, his fake sale in bulk to himself, and his fake auction on the sale in bulk).

XXX.

Because the District Court erred in its decision in holding and concluding

“the fact that the commission (on the sale in bulk by this trustee to himself) was claimed and held out was known to Main, and through him to the plaintiffs, and no complaint was made by them by reason thereof”;

XXXI.

Because the District Court erred in its decision in holding and concluding

“The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake,”

and its inference hereon that there was no other proof.

XXXII.

Because the District Court erred in its decision in holding and concluding this trustee's sale slips had not been impeached and that practically all the goods had been accounted for and that the complainants had failed to show their trustee incorrect up to the time of the sale in bulk to himself.

XXXIII.

Because the District Court erred upon the trial and in its decision in its acceptance over complainants' objections of the so-called “report” (Defendant's Exhibit “B”), of the hired expert Herrick, admittedly

made up from selected, self-serving data furnished him *ex parte* by the defendant before the trial and without reference or consideration of the evidence of the complainants as to the facts and based upon insufficient data, upon copies of papers without the absence or destruction of the originals being accounted for, and in the total absence and withholding of evidence such as adding machine totals, cash register totals, and salesmen's indexes, by which alone their accuracy could be established.

The Court's unquestioning acceptance and reception in evidence of this letter-proof report which was a most glaringly imaginative composition as bearing upon the accuracy of defendant's figures and even upon his probity and honesty, was absurd and gross error, and repudiation of all the fundamental principles of evidence.

That the Court erred in admitting in evidence the sale slips unaccompanied by the usual checks of salesmen's indexes, adding machine and cash register totals, and different copies of receipts and vouchers, and the so-called record-book, Defendant's Exhibit "C," and in overruling the complainants' objections thereto.

XXXIV.

Because the District Court in its decision and reception of evidence erred in accepting unquestioningly over complainants' objection this opinion of defendant's hired expert Herrick, as to the defendant's own honesty and integrity based upon self-serving data selected by

the defendant *ex parte* weeks before the trial and placed in his witness' hands. Such opinion was not receivable in evidence unless based upon a thorough review of all the evidence in the case, and not upon *ex parte* statements of the defendant alone respecting his own honesty and integrity and to serve his own purse, regarding his dealings with the complainants. Such decision as to honesty and integrity was for the Court upon the entire evidence upon the trial to determine under the rules and decisions of equity.

XXXV.

The District Court erred in holding and concluding in its decision and accepting the said book of record or "cash-book" so called, Defendant's Exhibit "C," as a proper book of account of the trust fund or *sufficient in equity* upon an accounting by this trustee with his *cestui que trust* of his dealings with the trust fund.

The defendant's own witness Herrick testified, "The record is a very abominable accounting—the records from the standpoint of criticism, are abominable." It was the duty of this trustee to have kept proper books of account of the trust fund in his hands and his failure to do so constituted a strong presumption against him. Under the law and decisions this exhibit was manifestly not a proper book of account, especially in the absence and nonproduction of the person making most of the entries.

XXXVI.

In the absence of proper books of account by this trustee of the trust fund in his hands the District Court erred in not charging him with the full value of the fund in a sum aggregating at least its inventoried cost value. In the absence of proper books of account the burden rested squarely upon the defendant.

XXXVII.

Because the District Court erred in its decision and upon the trial in accepting the copies of the various original claimed vouchers mentioned in Herrick's "report" without the destruction or absence of the originals being accounted for; and permitting the paid expert of the defendant upon these unverified copies, to give an opinion as to whether the defendant had made a satisfactory accounting. That was for the Court under the rules and decisions of equity to determine.

XXXVIII.

Because the District Court in its decision erred in holding and concluding that every item in this defendant's expense account was satisfactory and fairly established.

XXXIX.

Because the District Court erred in its decision in holding and concluding and inferring the value of the trust fund in the hands of this trustee was only

about \$18,000 and that other parties concerned did not differ widely upon that question.

XL.

Because the District Court erred in its decision in holding and concluding that \$34,300 was the actual sound value of the stock.

XLI.

Because the District Court erred in its decision in holding and concluding that the statement rendered by this trustee and set forth in the complaint, which was forwarded to the companies with his purported "net balance" of \$1,049 became an account stated between the complainants and himself as their trustee.

The District Court erred in its citation of cases and rule of law on this point to the effect that the burden of proof rested upon the complainants; the cases cited being where the fraud or error was apparent upon the face of the account. In the present cause Isaacs' statement to the complainants does not reveal his sale in bulk secretly to himself; nor his charge of commissions on such sale; and his fraud upon his beneficiary is not apparent from the closest scrutiny of the account.

XLII.

Because the District Court erred in its decision in holding and concluding that the complainants acquiesced for more than two years in their trustee's account without question or protest. The evidence shows his fidu-

ciaries had no knowledge of the frauds of their trustee nor anything to put them on inquiry until the revelations in the Seynei suit against Isaacs in the federal court. Their action was then immediate.

XLIII.

Because the District Court erred in its decision upon the wrong hypothesis of acquiescence in imputing laches to the complainants; and holding that laches short of the statute of limitations could be set up by an agent; the statute of limitations in actions for an accounting in California being four years; and the present action having been begun nineteen months before the statute expired.

XLIV.

That the said decision of the District Court is against law and against equity.

That the evidence is insufficient to justify the decision of the District Court herein.

That the District Court in its decision erred in holding and concluding that the complainants' bill should be dismissed and in its order and decree dismissing their said amended first amended bill of complaint and in awarding costs to the defendant upon such dismissal.

Argument.

THE BARE NARRATION ALONE OF THIS TRUSTEE'S DEALING WITH THE TRUST FUND CONSISTING OF THE MERCHANDISE OF THESE COMPLAINANTS SHOULD BE SUFFICIENT TO REVERSE THE JUDGMENT OF THE LOWER COURT ABSOLVING HIM ON TECHNICAL GROUNDS, REGARDLESS OF THE MYRIAD CITATIONS OF THE PRINCIPLES OF EQUITY ESTABLISHED BY OTHER CHANCELLORS AND COURTS OF EQUITY DIRECTLY NEGATIVING THE HOLDING OF THE TRIAL COURT AND ITS SURPRISING DISMISSAL OF THE BILL OF COMPLAINANTS IN THE CAUSE AT BAR.

I SHALL, HOWEVER, FOR THE CONVENIENCE OF THE COURT, REVIEW THE EVIDENCE UPON THE RECORD, AND, BRIEFLY, THESE DECISIONS ALREADY WELL KNOWN TO YOUR HONORS, AS BEARING UPON THE FACTS ESTABLISHED IN THIS CAUSE, ARRANGING THEM UNDER FOUR GENERAL HEADS:

I.

	Pages
THE VALUE OF THIS TRUST FUND.....	57 - 75

II.

THE INSURANCE RETAIL SALE.....	75 - 87
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III.

THIS TRUSTEE'S ACCOUNTING.....	87 - 142
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IV.

HIS CLANDESTINE SALE IN BULK TO HIMSELF....	142
(A) THE FACTS	148 - 189
(B) THE LAW	189

Preface.

The complainants charged that this defendant did not return to them all moneys taken in by him for their account under the pleaded agreement with them but had withheld sums from them, of which they asked discovery; and that the amount previously paid over by him to them with a final statement did not constitute a full accounting by this defendant as their trustee and that his figures and totals were false and untrue;¹ and that in the rendering of his said final statement "its falsity and the fact of the existence of moneys so withheld by him from them has been *sedulously* and *fraudulently* concealed by him to the present time."²

With reference to the clandestine sale in bulk of their merchandise by their trustee to himself the complainants further specifically charged that they never had knowledge of it at any time until shortly before the commencement of the present action and that the defendant at all times concealed the same from them and that in his final statement he made no mention of it nor of his withholding from them commissions of 20% on his own purchase; and that such transfer to himself by their trustee of their merchandise "*was a gross fraud and imposition upon them*"³ and asked upon the accounting that it be set aside and that he be charged with the full value of the trust fund together with interest and his profits on it and that he return to them his commissions withheld upon the sale.

(1) Tr. p. 5.

(2) Tr. p. 7.

(3) Tr. p. 26.

And upon this appeal they earnestly insist that the lower Court throughout committed error in not so holding and deciding and not so charging their trustee upon his accounting (Assignment of Error VI).⁴

Before taking up in detail the various chapters relating to the evidence and proof upon the record, a few preliminary words may be of service to your Honors in a proper understanding of the cause. After the fire in the Bridge store in Seattle, George C. Main, an independent adjuster, and not a salaried employee of any of the complainant companies, was employed by them to adjust the loss.

The unfortunate condition of this adjuster during the time following the fire and the intimacies of his close private relationship to this defendant salvage man are not before your Honors through the District Court's refusal to receive any evidence of direct fraud;⁵ nevertheless in this connection the record at least shows that Main was not in the store during the two weeks immediately following the fire consumed in the taking of the first inventory;⁶ that Main wired Isaacs to come and asked him what was best to do; and Isaacs came and advised him; and that by this salvage man's own insistence Main allowed a compromise seemingly involving some \$16,200 damage, and agreed to let Isaacs take the stock upon his offer of a guarantee of \$18,100, although as Main himself testified, he "never put it

(4) Tr. p. 171.

(5) Tr. p. 78.

(6) Tr. pp. 48-63.

up to anybody else, no other quarters were bidding, and no one else entered into the transaction.”⁷ Naturally Isaacs’ interest was to advance as low a guarantee as possible, thereby making the damage estimate as high as possible. Main practically left it all to Isaacs and was a ready dupe although he testified he never agreed to \$16,200 as damage and absolutely refused to pay it, and it was a compromise of figures only on condition that the purchase price be reduced to \$34,300. Main further testified that upon this payment of \$34,300 cash to the assignee of Bridge, Main turned the stock over to Isaacs, put it entirely in Isaacs’ hands; and he continues—“as to his method of disposing of it, I put it entirely up to him. It was entirely in his hands. I had nothing to do with it. He could do as he pleased.” Isaacs himself testifies he had the keys turned over from Main⁸ and took possession of the stock; and the complainants’ bill (uncontroverted by the answer) fixes the sole and exclusive possession and *control* of the merchandise upon the defendant in the following clear-cut terms:

“That the defendant after thus contracting with the complainants did actually take over *into his exclusive and sole possession and control* their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned proceeded to sell the same.”⁹

(7) Tr. p. 119.

(8) Tr. p. 143.

(9) Tr. p. 4.

The *answer* (tr. p. 16) :

“VIII.

Admits that defendant had in his exclusive possession and control said Bridge stock merchandise.”

We therefore have this stock undeniably in the sole possession *and control* of the defendant. Now, what was its condition and value at the time he so took possession and control of it?

I.

THE VALUE OF THE TRUST FUND.

(a) Isaacs' returns grossly inadequate.

From a consideration of the actual value of this trust fund, it will be seen how inadequate Isaacs' returns were.

Its *wholesale* value at the time it came into the hands of this defendant as trustee was over \$45,000;

Its *retail* value was \$60,000; yet

He claims to have disposed of about one-third of it to the public for \$17,807, at retail, and the balance to himself in bulk for \$11,094 at wholesale; the two sales making a total for the entire stock of only \$28,901 gross, or \$19,149 net, *which is 58% less than the original cost to Bridge at wholesale.*

The record before the Court shows the fire was all over in 20 minutes; that it was confined to six feet of floor space;¹⁰ that there was very little serious damage,

(10) Tr. p. 79.

only merchandise on one or two tables being damaged by the fire;¹¹ the total amount of which did not exceed \$500; and that most of that was afterwards reconditioned and sold.

Mr. Main testified there was very little damage by fire. Mr. Mason even testified to the small amount (from \$300 to \$700) of serious damage which was all confined to one or two tables.¹² Everyone knows that smoke does not cause a permanent damage; shirts, underwear, etc., can be laundered and reconditioned; shoes and merchandise in boxes or cases, and rubber goods, would not be damaged at all. The various clerks all testified to the small amount of damage.

(b) The complainants' merchandise was marked and sold by Isaacs on an average of 20% above its wholesale cost prices in the first inventory.

Mr. Basher in charge of the shoe department testified that 90% of *the entire stock* was good and undamaged; that the shoes were mostly marked above cost, i. e., cost to Bridge, by Isaacs for the complainants sale; and that about half of them were marked 20% above cost.¹³

Mr. Johnson, a salesman in the clothing department, testified that only 10% of the clothing was damaged in one way or another, although the clothing as a rule is more susceptible to damage than any other line in a store; and that yet this clothing for the complainants' sale was marked from 10 to 15% above cost.¹⁴

(11) Tr. p. 75.

(12) Tr. p. 117.

(13) Tr. pp. 85-86-87.

(14) Tr. p. 88.

Mr. Meyer, a salesman in the furnishings department, was familiar with prices all over the store, and testified that the stock was marked under the defendant's direction for the complainants' sale 15% above cost and better. He marked the furnishings, hats and caps, and they were all above the Bridge cost except those sold as leaders or burned; *that even the merchandise that smelled badly and was smoked* was marked above cost while the burned and watersoaked only was marked below; of these facts he was absolutely sure and no cross-examination could shake him.¹⁵

Mr. Jeremy, in charge of the clothing department testified that the fire was all over in 20 minutes and was confined to six feet of floor space; and that only merchandise on one or two tables was burned; and estimated the actual damage by fire at \$500 or \$600; and that the merchandise on Isaacs' sale for the complainants was mostly marked and sold 25% above its original Bridge wholesale cost, and that only the damaged was marked below. He testifies Isaacs instructed them to mark everything 25% above.¹⁶

Mr. Seynei was Isaacs' manager for the entire stock at the sale for the complainants, and testified the actual damage by the fire was only about \$500, and that for the complainants' sale the goods were marked on an average of 20% above the Bridge cost price; and that only the damaged was marked below and some collars and overalls which were afterwards raised. That only

(15) Tr. pp. 89-90.

(16) Tr. p. 75.

the badly damaged merchandise was marked below and it was few and inconsequential;¹⁷ in fact the stock was hardly damaged at all.¹⁸

The first inventory in evidence itself designates the exact number of articles damaged and of no value in the entire merchandise to be of the exact inventory value of \$558.20. YET THIS DEFENDANT SWEARS, "THE FIRE BURNED THROUGH THE PREMISES" (it was by such misrepresentations that Main was influenced), but a miracle must have happened, for almost in the same breath the defendant says only three or four hundred dollars' worth of merchandise was burned, all of which was sold at different prices (tr. p. 152).

Merchandise which was marked by this defendant's own directions from 10% to 25% above the original Bridge wholesale cost and was sold on those markings could not have been badly damaged. Merchandise which realized at retail over \$42,151 (as we will show later on) could not have been damaged much.

(c) It was a staple stock.

The record shows as the owner, Mr. Bridge¹⁹ and Mr. Mason,²⁰ testified, this large stock, the biggest of its kind in Seattle, to have been a staple stock of standard merchandise and in good condition; \$20,000 of it being new stock; and that its odds and ends had been sold off at a successful sale some months before the fire; and that Mr. Bridge was a man of wide experience in

(17) Tr. pp. 45-48.

(18) Tr. p. 45.

(19) Tr. pp. 92-93-94.

(20) Tr. p. 112.

the clothing business, having amassed an estate from \$100,000 to \$200,000 and had been successful up to the time of the fire; that he was a very close buyer and discounted his bills; and that he was forced into an assignment to the Seattle National Bank, to whom he owed a mere \$15,000 indebtedness borrowed from the bank to enable him to discount his bills for this new merchandise.

The first inventory (Plffs. Ex. C) was taken immediately after the fire under Mr. Mason's (adjuster for the assignee of the assured) direction and included everything on the premises. It was taken at the original cost prices paid by Mr. Bridge less the freight and discounts and this inventory is conceded by all parties and even by the trial Court to have been correct. Its amount was \$45,954.48 at Bridge cost prices. Mr. Bridge testified that if the freight and discounts were added, the wholesale cost of the stock to him would be over \$50,000, and that its value as a whole *after* the fire was at least that; and that if he had been let alone, he himself would have had a sale and netted 15% above the amount of this first inventory.²¹

(d) Bridge's assignee sacrificed the stock when he sold it in bulk to complainants for \$34,300 cash.

Mr. Mason testified that as the representative of the bank he was instructed to make a quick settlement, as another rental of \$920 was coming on which the bank did not wish to pay, and that the creditors (the bank being the principal one) were clamoring for their

(21) Tr. p. 93.

money; and that thus acting under and only by virtue of his direct instructions and orders he sold the stock to the complainants for \$34,300; but his own two capable men had examined the stock *after* the fire and reported it then worth some \$39,000, and that the very lowest he himself personally would have consented to take for it at wholesale in bulk after the fire would have been \$36,000.²² Mr. Bridge never consented to selling it at \$34,300 and is suing his assignee for sacrificing his stock at that price.²³

Mr. Mason further testified that he knew the stock well and the stock in the hands of such an expert as Isaacs should have sold at the first inventory Bridge cost prices and that the best of it should have sold way above, and that he should have been *disappointed if it had failed to bring the prices marked in the first inventory*.²⁴

Both Mason²⁵ and Main²⁶ testified an estimated loss does not mean a total loss, sometimes 50% of the loss can be recovered; also that for the purpose of a fire sale such a stock was worth from 20% to 50% more than at an ordinary sale. Mr. Seynei and Mr. Jeremy testified that a fire is a big drawing card, merchandise sells quicker and to better advantage than at an ordinary clearance sale.

(22) Tr. p. 112.

(23) Tr. p. 93.

(24) Tr. pp. 113-117.

(25) Tr. pp. 112-113.

(26) Tr. p. 119.

Mr. Seynei, who had been with Bridge as his manager for many years, and knew the stock as no one else save Bridge could know it, testifies as follows:

“Its retail value before the fire averaged about 33 $\frac{1}{3}$ % above its wholesale cost, making the stock of goods about \$60,000 in value. There was very little difference in the retail selling value before and after the fire. The actual damage to the stock by the fire did not exceed \$500. After the fire that stock of merchandise would sell quicker, to better advantage and you could get more for it than during a clearance sale. In round figures the value of the stock after the fire in the hands of an expert like the defendant would not be any different than the original price before the fire; the retail price value being something like \$60,000. On a fire sale, as a general rule, the percentage a stock is worth over an ordinary sale is about 20%; about 20% more than at regular sale. A fire sale speaks for itself.”²⁷

That \$48,000 was invested in that stock and the stock was worth 100 cents on the dollar at cost prices.²⁸

Mr. Jeremy, who managed the clothing department constituting over one half the stock, and who is an expert merchandise man with experience in England, Canada and the United States, testified also the stock after the fire was worth \$60,000 at retail.²⁹

(Yet, the District Court in its opinion and decision held its value to be only \$18,000.)

Isaacs' own figures show he sold about *one-third* of it at retail to the public for the complainants for \$17,800.

(27) Tr. p. 45.

(28) Tr. p. 63.

(29) Tr. p. 75.

As to the balance Isaacs in his second inventory of \$24,600, and in his statement in his own handwriting on the Hotel Herald stationery, Complainant's Exhibit 16;³⁰ and in his declarations to Mr. Seynei, his partner, that this merchandise as shown by this second inventory "was worth *one-hundred cents on the dollar*," himself gives unequivocal expression as to its actual value.

"The defendant spoke at the time of the profit, about \$13,000, he made on the transaction of the sale in bulk at that time and said he had made a successful purchase from the complainants."³¹

Mr. Mason also testified that to this \$11,094 paid by Isaacs for this balance of the Bridge merchandise, would have to be *added* the *profits*, which should be about \$6800, *and* the *expenses* in order to arrive at the actual value of this portion of the stock.

Isaacs advanced a *net* guarantee of \$18,100.

This guarantee, Main, a close friend of Isaacs', and a very adverse witness to the complainants, his former employers, testified in no wise represented the value of the stock even at wholesale,³² and that he expected considerably more than this guarantee would be netted by the companies, and he wrote the complainants to that effect September 8, 1913, otherwise there was no object in their taking over the stock, as the estimated damage did not mean a total loss as much of it could be reconditioned and sold; and that he had refused to

(30) Herein p. 166.

(31) Tr. pp. 62-63.

(32) Tr. p. 120.

allow \$16,200 as damage and that he got the valuation down as low as possible so that these companies could buy at wholesale in bulk and sell at retail and make a large gain. Main wrote these complainants September 8, 1913:

“Finding I could not agree with Mr. Mason, I took the other tack of getting the sound value down as low as possible with the idea of eventually taking the stock.”³³

In this cause, therefore, the “sound value” so called in reality represents a *purchasing price at wholesale*, and to this purchase price should be added the expense of selling and the profit in order to arrive at a correct and fair selling valuation.

Every stock has two values—a buying and a selling. This equity suit has to do with the *selling value*, i. e., WHAT DID ISAACS REALIZE FOR THIS ENTIRE STOCK AT RETAIL?

Thus the complainant companies paid \$34,300 cash for the Bridge stock *in bulk at wholesale*, expecting to realize a gain by selling it out again through this trustee *at retail* to the public.

This honest salvage man, however, says he sold about one-third of it to the public for \$17,800, and the two-third balance to himself for \$11,094, the total thus averaging gross 40% *below* its original Bridge inventory cost of \$45,954.48 (which cost did not include the freight and discounts paid by Mr. Bridge). Fortunately we have records, which show exact figures and give

him the lie direct; these are the books of his own partnership referred to herein as the Seynei books.

(e) The actual selling value is shown to be above the prices given in the first inventory.

Isaacs formed a partnership with Mr. Seynei for the purpose of handling this balance of the stock purchased by him and they conducted a sale under the name of *Harry Seynei* at the same location.³⁴

The Seynei books in evidence show that that portion of the "tail end" of the Bridge stock, the "remnant", which was sold at the Seynei *seven* weeks sale realized \$13,980.02.³⁵

The entire balance or the whole $\frac{2}{3}$ of Bridge stock sold in bulk by this trustee to himself realized at retail \$24,351,³⁶ which amount added to Isaacs' purported cash sales of \$17,800 at the insurance retail sale makes the total retail receipts for the whole stock \$42,151, which amount does not include Isaacs' depreciation, hidden returns, gifts to adjusters, etc., which would show the stock actually sold above the first inventory cost prices.

It may be readily seen that at the trial Court's accepted valuation of only \$18,000 for the whole Bridge stock, some one must have made a large profit; and it must have been Isaacs. These complainants only received \$19,149.81 net (guarantee \$18,100 and final payment \$1049.81) for this entire Bridge stock for which

(34) Tr. pp. 53-159.

(35) Herein p. 68.

(36) Herein p. 72.

they paid in cash \$34,300, expecting to sell at a large gain, as Main says, over the purchase price.

(f) Its actual selling value as shown by the books of the defendant's own partnership.—Examples.

It is proven by the Seynei books in evidence before this Court that this trustee made a personal profit on his manipulation of the trust fund away from the *cestui que trust* of ten per cent (10%) above the original Bridge cost price on this “remnant” which he bought in bulk net at 65% below the original cost price.³⁷

The summary³⁸ by Klink, Bean & Co. of these Seynei books shows Isaacs' partnership added small purchases from time to time to this Bridge stock, the new stock so purchased aggregating in all \$6263.78 and representing one-sixth ($\frac{1}{6}$) of their entire stock; that the total cash sales were \$16,067.94, and the total profit was \$1,784.38 over and above the original cost of this merchandise; thus we have the exact amount realized at that sale. Mr. Klink testifies:

“In dollars and cents the profit was about \$500 on the new stock, and about \$1200 on the Bridge stock.

“The actual amount of profit on the Bridge stock alone was \$1262.40 above its inventory cost.”

Mr. Seynei testifies:

“I have testified that one-quarter of the new stock was sold for \$1565, at one-third profit, or approximately a profit of \$521; and by deducting that from the total profit of \$1784 you find the

(37) Tr. p. 83.

(38) Tr. p. 228.

profit on the Bridge stock alone, about 10% profit on the remainder of the stock; about \$1200. Thus the Bridge stock on the Seynei sale sold for \$1264 more than its inventoried cost price; which is about 10% above cost.

The merchandise at the insurance sale did not sell 20% below cost as claimed by Mr. Isaacs."³⁹

Mr. Jeremy testifies:

"One quarter of the new stock sold at the Seynei sale and had a profit of $33\frac{1}{3}\%$."⁴⁰

To eliminate the new stock entirely and to be more than fair to this trustee, I present two examples based upon varying proportions of this \$6263 of new stock which was sold at the Seynei & Co. sale, in ascertaining his profits on the Bridge stock alone at that sale. The amounts are taken from the Seynei books by Klink, Bean & Co., accountants, and these examples are prepared by them.

First Example:

If one-fourth ($\frac{1}{4}$) of the new stock of \$6263.78 purchased after Inventory No. 2 were sold at a profit of $33\frac{1}{3}\%$ there would have been a profit on the *Bridge stock alone* of 9.93% above the original Bridge cost.

	Total	New Stock	Bridge Stock
Sales	16 067 94	2 087 92	13 980 02
Cost of Goods Sold	14 283 56	1 565 94	12 717 62
Profit	1 784 38	521 98	1 262 40
Per Cent of Profit to Cost	12.5%	33.3%	9.93%

(39) Tr. p. 61.

(40) Tr. p. 78.

In other words Isaacs sold this Bridge stock about 10% *above* the original Bridge cost in the first inventory.

Second Example:

If *all* of the new stock of \$6263.78 purchased after Inventory No. 2 were sold at a profit of $33\frac{1}{3}\%$, there would have been a loss on the Bridge stock sold of 3.8%.

	Total	New Stock	Bridge Stock
Sales	16 067 94	8 351 70	7 716 24
Cost of Goods Sold	14 283 56	6 263 78	8 019 78
Profit	1 784 38	2 087 92	303 54
Per Cent of Profit to Cost	12.5%	33.3%	Loss 3.8%

On that hypothesis, in other words, this Bridge merchandise sold only about 3% below the original Bridge cost.

In order to remove any confusion in your Honors' minds as regards the actual amount of sales of this new stock and to give this defendant the benefit of every conceivable argument in the premises, I emphasize to your Honors the second example that *if all the \$6263 of new stock* was sold (prima facie this is impossible for at the end of this Seynei & Co. sale over half of their partnership stock was left as shown by the third (3rd) inventory, Complainants' Exhibit 9⁴¹ totalling \$16,633.57) the Bridge stock alone sold at only some

(41) Tr. p. 220.

3% less than its original Bridge cost as given in the first inventory!

If we examine the shoe department separately,⁴² it will show that the Bridge shoes alone at this Seynei sale sold 15% above the original Bridge cost prices, after granting that *all* the new shoes were sold and at a profit of 33⅓%, prima facie this is impossible as one-half of the stock was later shipped to San Francisco.

Likewise the clothing⁴³ which represented about one-half of the entire stock at all times was sold *above* the original Bridge cost prices, and the clothing at the Seynei sale was practically *all Bridge clothing* for less than 1/16 was other than Bridge clothing.

These figures all show the actual selling value of the "remnant" to be at the very least about inventory cost prices, and in many instances *far above*, all of which directly impeaches Isaacs' purported returns (gross) at complainants' retail sale of only \$17,800, which are 20% *below* that same actual original Bridge cost as given in that first inventory.

Even if we deduct all the expense, \$3133⁴⁴ of selling as shown by the Seynei books, the *net* returns from the Bridge stock at the Seynei sale would average nearly 10% *higher* than Isaacs' purported *gross* returns at the Insurance Retail sale. The evidence was the same selling prices were left on the tags for both the Seynei and the Insurance Retail sale.

(42) Tr. p. 229.

(43) Tr. p. 229.

(44) Tr. p. 227.

The statement of this trustee and his production of only sales slips amounting to \$17,800 strains credulity to the breaking point.

(g) The actual amount realized by this trustee from the portion of the trust fund transferred to himself in bulk.

Now, a time finally comes when both the Bridge and this new stock was entirely disposed of by Isaacs. His partnership sales as shown by the Seynei books and their summary by Klink, Bean & Co. (Plffs. Ex. 18),⁴⁵ in evidence, amounted to \$16,067.94 and the balance of this merchandise was brought to San Francisco by Isaacs; and a third inventory taken of it at that time showed they still had \$16,633.57 left; and Judge Van Fleet in the Seynei case, Equity Cause 83, Northern District of California, placed the actual value of that remainder at the amount named in this same third inventory or \$16,633.57.⁴⁶ So the \$16,067.94 realized by this trustee's partnership at the Seynei sale and the stock they had left after it as shown by this third inventory in the sum of \$16,633.57 makes in all \$32,701.51.

This consists of the \$6263.78 of new stock and Bridge stock. The record shows this new stock was sold at one-third profit, by the testimony of Mr. Seynei and Mr. Jeremy, and the defendant nowhere denies it, making the receipts from the new stock \$8350.30, which deducted from the above total of \$32,701.51 leaves \$24,351.21 for the Bridge stock alone, being the amount Isaacs actually realized for this stock. He paid \$8875

(45) Tr. p. 227.

(46) Tr. pp. 159-160.

for it, thus Isaacs realized \$15,466.21 more than he paid these complainants for it; and yet the District Court held that \$18,100 was a correct value of the entire Trust Fund and dismissed these complainants out of Court! (Assignment of Error XXXIX, tr. p. 206.)

Isaacs' partnership sales, as shown by the Seynei books	\$16,067.94
Leaving amount of merchandise remaining as evidenced by the third inventory (Compls. Ex. 9) at	16,633.57
Total	<hr/> \$32,701.51
New Merchandise (other than Bridge stock)	\$6,263.78
33 $\frac{1}{3}$ % profit thereon as testified to by various witnesses	2,086.52
Making total sales of merchandise other than the Bridge stock	<hr/> 8,350.30
Total amount realized from the Bridge stock purchased by Isaacs in bulk	\$24,351.21

Those are the exact figures taken by Klink, Bean & Co. from the Seynei books and the third inventory; and they represent a rather good sized personal profit for this trustee to make off his beneficiary on the poorest part of their merchandise as compared with his actual returns of \$28,901 to them on their *entire* stock which returns were \$5399 less than these complainants actually paid Bridge's assignee in cash for it in bulk at whole-sale. These figures are gross. Taking Isaacs' *net*

returns to the complainants of \$19,149 from the \$34,300 cash paid the assured, *these complainants in reality lost \$15,151* through their trustee's dishonest manipulation of the trust fund for his individual personal gain.

I have shown that Isaacs' personal profit on their merchandise was \$15,466. *That profit should have gone to the complainants.*

RECAPITULATION.

From the foregoing evidence it is clearly to be seen that the value of the trust fund was greatly in excess of Isaacs' false and depreciated returns and that it was at least of full inventory value, for your Honors will not overlook the facts:

1. The entire Bridge stock was a staple stock.
2. The small amount of damage as testified to by disinterested witnesses.
3. Also they testified, even such an estimated loss is not a total loss. Goods can be reconditioned and sold at a profit. The adjusters Main and Mason and Mr. Seynei and Mr. Jeremy testified that for the purposes of a retail fire sale such a stock of goods was worth from 20% to 50% more than at an ordinary sale; and that such is the case is really axiomatic with anyone acquainted with handling merchandise for fire sales.
4. The price at which the goods were marked and sold by Isaacs, being on an average 20% *above* their original Bridge cost price.
5. Mr. Bridge, the owner, testifies that *after* the fire his stock was worth over \$50,000.

Mr. Seynei, the manager, testifies the stock was worth \$60,000 at retail.

Mr. Jeremy, the head salesman, testifies the stock was worth \$60,000 at retail.

6. Even this trustee admits and the evidence shows he sold about one-third of it at retail for \$17,800.

7. Mr. Mason also testifies he personally would never have sold the stock in bulk to the companies at less than \$36,000 at a *wholesale* price; and that the merchandise should have sold at retail at and above its original Bridge cost prices as shown by the first inventory.

8. The Seynei books and third inventory in evidence show that on the balance of this same stock this trustee realized about \$24,350, thus making some \$42,151 in all which he must account for, and does not include Isaacs' depreciation and hidden returns.

9. The personal profits realized by Isaacs as shown by the Seynei, his partnership books, to have been 10% above the original Bridge wholesale cost in the first inventory, on the "remnant" or poorest part of the stock.

10. The actual amount realized by Isaacs from all the merchandise transferred to himself in bulk being \$15,466 more than he paid for it.

11. Isaacs' own valuation as to this balance purchased by him being of inventory value by his statements to Mr. Seynei, his partner, and his admission, in his own handwriting on the Hotel Herald stationery (Compts. Ex. 16) of the stock sold to himself in bulk

to be worth \$24,603 and his statement to Seynei that it "was worth one hundred cents on the dollar", give unequivocal expression as to its actual value, as well as the entries in his own partnership books.

12. Mason testified that to this purported \$11,094 paid by Isaacs for this balance of the merchandise would have to be *added* the *profits*, which should be some \$6800, *and* the *expenses*, in order to arrive at the actual value of this portion of the stock.

13. The valuation at inventory cost prices of the tail end of this stock after the Seynei sale as shown by the third inventory, and as established by Judge Van Fleet in the Seynei case as its actual value.

Never throughout the entire history of the selling at retail of this whole stock does its selling value fall below Bridge inventory values except in Isaacs' purported returns at the retail insurance sale, and which returns I shall show are false and untrue.

II.

THE INSURANCE RETAIL SALE BY THIS TRUSTEE FOR THE COMPLAINANTS.

(a) He claims to have received gross only \$17,800.

On September 6 Isaacs opened the insurance retail sale.

For merchandise inventoried at \$21,301 (difference between the first and second inventories) this defendant claims to have received at this retail sale but \$17,800 (gross), being 20% below the same original Bridge cost.

(b) Five of his own salesmen give him the lie direct.

Messrs. Bascher, Johnson, Meyer, Seynei and Jeremy testified without contradiction by any salesman produced by the defendant, that upon Isaacs' sale for these companies their stock was marked and sold at 10% to 25% *above the Bridge cost* prices in the first inventory. For instance:

MR. BASCHER.

Mr. Bascher was his salesman in the shoe department. He testified the shoes were mostly marked at their Bridge inventory cost and above; at least one-half were marked and sold 20% *above*; and that nothing was marked down from the original Bridge cost price—most everything marked above; that 90% of the entire stock was good and undamaged; that it was a successful sale and the same prices were left on the merchandise for the Seynei sale, and that it was not remarked; and that the best of the shoes sold first; and that there had been a cleanup sale before the fire, after which much new merchandise was bought.⁴⁷

MR. JOHNSON.

Mr. Johnson was Isaacs' salesman in the clothing department. He testified that the clothing was marked and sold from 10% to 15% *above* the original Bridge cost prices; that the clothing in one way and another was less than 10% damaged, although it is more susceptible to damage than any other line.⁴⁸ It was a successful sale; that the best sold first, and that the

(47) Tr. pp. 85-6-7.

(48) Tr. p. 88.

same selling prices were left on the goods for the Seynei sale.

MR. MEYER.

Mr. Meyer was Isaacs' salesman in the furnishing goods department. He testified that he marked the furnishings and hats and some pants for the insurance retail sale; that they were all marked and sold 15% *above* the Bridge inventory cost prices and better. To quote his exact words:

"I am absolutely sure that everything that goes under the heading of furnishings, hats and pants and underwear was marked above the Bridge cost; the stuff that was burned and water-soaked was marked below, but the stuff that smelled badly and was smoked was *not cut down below cost.*"

That he sold all over the house and knew on that insurance retail sale that the other departments were all marked above the original Bridge inventory cost prices; and that the same prices were left on the goods for the Seynei sale. A few odds and ends only were cut from the original Bridge cost prices, and that of these some were raised later, as for instance overalls and collars. The little merchandise sold at reductions was damaged or was sold as leaders. That there was a clean-up sale before the fire, after which much new stock came in.⁴⁹

MR. SEYNEI.

Mr. Seynei was Isaacs' manager of the insurance retail sale for the complainants. He testified that the stock on that sale was staple, and in good condition,

(49) Tr. pp. 89-90.

and included some \$20,000 of new stock which had come in. That he was in full charge of the marking of the merchandise for that sale and that he personally directed how the stock should be marked. That the complainants' merchandise was marked for that sale on an average of 20% above the first inventory Bridge wholesale cost; and that there was nothing marked below cost except a little used as leaders, and this percentage marked below was very little and very inconsequential. That the goods were sold on these markings and there were no cuts in prices. Some prices in fact were raised during the sale, such as shoes, overalls, and collars; and that the prices were all plainly marked. For instance, as shown by the sales tags (Plffs. Ex. 1) in evidence of a suit which cost \$9.50 and sold for \$12.75; another which cost \$7.75 and sold for \$12.50; another which cost \$8.50 and sold for \$11.75; another at \$11.50 sold for \$13.50; another at \$7.00 sold for \$10.00.⁵⁰ That at a so-called "fire sale" such as this, the merchandise is highly advertised and you can get better prices than at ordinary sales. Mr. Seynei testified the sale was most successful and that there was no reason for stopping it and closing it down except that Isaacs wanted to get the stock for himself. Three days before the sale closed Isaacs stated to several people, including Seynei, that he had made *his guarantee (\$18,100) good above all expenses*.⁵¹

After the sale in bulk to himself by Isaacs the same tags and prices were left on the merchandise

(50) Tr. pp. 48-49.

(51) Tr. p. 50.

for the Seynei sale as had been on for the complainants' retail sale; and from his personal knowledge and as his books in evidence show that balance sold at the Seynei sale 10% *above* the original first inventory Bridge cost prices.

MR. JEREMY.

Mr. Jeremy was Isaacs' salesman in charge of the clothing department on his retail sale for the complainants. He testified he assisted the manager Mr. Seynei and was most familiar with the Bridge stock on that sale; and that at that sale there was between \$20,000 and \$22,000 new merchandise in the stock. That the merchandise at that sale was mostly marked about 25% *above* the original first inventory Bridge cost prices and was so sold as it was marked. That the defendant and Mr. Seynei gave the instructions as to the merchandise being so marked 25% above the Bridge cost; and that over three-quarters of the stock was so marked. That he personally marked the clothing himself which represented the biggest part of the stock. All was marked above cost except that which was actually burned, which did not amount to over \$500. That *before the retail sale closed* he heard Isaacs say he was "*on velvet*" right then.⁵² The merchandise on this insurance retail sale sold rapidly and he could see no reason for closing the sale down as it was running along all right.⁵³ Everything was all plainly marked and the same prices were left on for the Seynei sale. That at such a sale as this retail

(52) Tr. pp. 75-76.

(53) Tr. p. 77.

sale or so-called "fire sale" the fact there has been a fire is a big drawing card and the stock sells at better advantage than at an ordinary sale.

(c) **Mr. Bridge and Mr. Bailey also contradict the defendant's abbreviated returns of \$17,800.00.**

MR. BRIDGE.

Mr. Bridge, the owner of the stock, testified it was a staple stock. No odds and ends. In making up his inventory he did not add freight to the cost price, nor his discounts. His stock was over \$50,000 in value *after* the fire. He could have sold this merchandise himself from 15% to 20% *above* the first inventory cost prices if he had been let alone. That after his clearance sale of odds and ends before the fire he filled in the stock with \$20,000 worth of new merchandise.

That he was in the store every day during Isaacs' insurance sale for the complainants and examined the tags on the goods, and was familiar with the way it was marked and sold. For instance, some \$7.00 and \$8.00 suits were marked \$12.33, \$14.75; \$10.00 and \$11.00 suits were marked \$17.85.

That nothing was marked below cost and the merchandise on that retail sale was marked at a fairly good profit. Isaacs himself told people it was a very successful sale. *Before the close of the sale* he heard Isaacs say he had then taken in *both all his guarantee and expenses*. That he himself before the fire conducted a clearance sale and cleaned up at a profit

of 20% to 25%. That the cost mark on the merchandise as given in the first inventory shows what he actually paid less the discounts and freight which he did not add. He was very much surprised when Isaacs closed down the complainants' sale at retail.⁵⁴

MR. BAILEY — ISAACS' OWN ADMISSIONS.

Mr. Bailey had his office near the Bridge store, and was in the store frequently every day or two during the sale. He met Isaacs for the first time the morning the insurance retail sale opened in September, 1913, and had many conversations with the defendant after that during the sale and testified the defendant told him the complainants' sale was going along very satisfactorily; that it was going beyond his expectations both in volume of goods sold and prices received.

That he had two conversations with Isaacs during the last week of this retail sale in relation to the proceeds of the sale and the amount of Isaacs' profits.

In the first, the forepart of the week, Isaacs said the sale had gone very favorably; that he was going to get out of it that week his entire guarantee (\$18,100), expenses and commissions.

That in the second conversation later in the week on the Saturday the retail sale closed, Isaacs stated emphatically to him that the sale *had paid then all of his guarantee, expenses and commissions*, and that he had gotten unusually good prices; that he had gotten above the original cost prices for the goods, and that

the sale was a complete success; that while the stock was being advertised below the original Bridge cost, *the merchandise really was selling above, that he had realized nearly 20% above the original Bridge inventory cost*; and boasted that he, Isaacs, could get more out of such a sale than others usually could; and that the defendant was beaming with satisfaction.⁵⁵

Mr. Bailey testified the sale was the largest ever held in that part of the State and that the crowd of people in the store was so great they had to have police help, and often a doorkeeper to close the doors to shut out the crowd of buyers pressing in.

That he was also told by the different salesmen for Isaacs on that sale that the sale was bringing above the inventory cost of the merchandise while they were advertising they were selling it below.⁵⁶

That he had equal knowledge of the Seynei & Co. sale following the complainants' retail sale; and that the insurance retail sale was equally as successful as Isaacs Seynei & Co.'s sale; and was at a little better figure.

- (d) **The testimony of various experts shows the defendant's purported retail returns to be way below the real selling value of the merchandise.**

Mr. Mason, the adjuster for Bridge's assignee, testified:

"It was a staple stock. I consider a stock in competent hands handled as a fire salvage stock

(55) Tr. pp. 97-98.

(56) Tr. p. 100.

would yield anywhere from 25%, 30%, 40% or possibly 50% above its actual value. The first day of the retail sale the defendant told me the proceeds were something like \$4000. He spoke very optimistically of it.”⁵⁷

Also that on the insurance retail sale for the complainants that that stock should have sold at retail at the Bridge inventory cost in Isaacs’ hands; that the best sells first and should have sold way above inventory cost; “and if the defendant’s statement shows that that stock brought 25% below, I would be disappointed in the returns. I would consider the sale very disappointing.”⁵⁸

Main and Mason, Seynei and Jeremy, all experts, agreed in their testimony that a fire sale is thus a big drawing card and that a stock at a “fire sale” should bring from 25% to 50% over and more than at ordinary sales. Main testified that merchandise can be reconditioned and sold; sometimes 50% of the loss is recovered,⁵⁹ and it is quite evident with such a stock as this, where there was practically no damage by fire, the amount of recovery would be the maximum, for this was not a perishable stock of dainty silks and laces, but consisted of Alaskan outfits, rubber goods, leather goods, shoes in boxes, men’s underwear and clothing.

(57) Tr. p. 112.

(58) Tr. p. 117.

(59) Tr. p. 119.

- (e) His own partnership books contradict this trustee's memorandum "cash book" and its purported sales entries of only \$17,800.

The mute testimony of the elaborate books of H. C. Seynei & Co. in evidence, certainly not made out with this litigation in view, and which were kept by a competent, disinterested bookkeeper, and their summary by Klink, Bean & Co. (Plffs. Ex. 18), substantiate the foregoing facts and disprove this trustee's purported receipts, for they show that after this trustee's transfer of the balance of the complainants' merchandise in bulk to himself at wholesale, that this "tail end", or as the defendant and his counsel so naively refer to it—"the remnant"—*sold 10% above the Bridge cost prices in the first inventory.* After deducting the expense of selling, it sold *net* on an average of 10% *higher* than his purported *gross* returns.

Yet our honest salvage man represents he sold at the retail sale the best of this stock 20% *below* Bridge cost prices and that the price he claimed to have received for it was above its actual value; and the District Court accepted his figures.

From the foregoing evidence of five of the defendant's own salesmen, of Mr. Bailey and Mr. Bridge and Mr. Mason, we gain an accurate knowledge what the trust fund which came into Isaacs' hands sold for; for the evidence is all to the effect that the goods was mostly marked and sold on an average of 20% *above* the Bridge cost prices as given in the first inventory. That at those prices it sold rapidly at one of the most successful sales ever conducted in Seattle. These

Seynei books of Isaacs' own firm also give mute evidence that that portion of the stock at the Seynei sale *after the best had been sold at the insurance retail sale realized 10% above these same Bridge cost prices of the first inventory.*

These are not figured computations by a lone hired witness, nor have they been contradicted by the defendant in any way, but from witness after witness produced by complainants and all from disinterested sources. Moreover, we have the defendant's own statements as to the amount taken in being equal to his guarantee, \$18,100, *and all expenses.* This is all sufficient to establish the value of this trust fund and its proceeds at the retail sale as far greater than represented by this trustee in his purported "cash receipts" of \$17,800, which is 20% below Bridge cost prices.

I shall, however, for the further information of this Court, proceed to expose this trustee's false accounting upon the trial and selected data furnished the Court, and his fraudulent methods in concealing the true and correct receipts from the complainants' merchandise and his dishonesty and treachery in obtaining for himself the possession of the balance of it for a grossly inadequate consideration far below its actual value and for a mere song.

Further, neither does Isaacs' self-serving declarations, his selection of loose-leaf sales slips, his purported *pencil* "cash book", or bank deposits, verify the integrity of this purported \$17,800 total cash sales on his retail sale for the companies, and the most his witness Herrick, the loyal accountant, can do is to

claim for him that “unless they are false, they are correct”.

These companies by direct proof show they *are false* and like all this trustee's totals they “are false and untrue” and that the fact of their falsity, in the words of the bill, “has been sedulously and fraudulently concealed by the defendant to the present time”, and that his unfortunate showing is, to say the least, inaccurate, contradictory, spurious, and sophisticated, and in no way represents the true value of the trust fund or its proceeds, and that the decree dismissing their bill and the District Court's filed opinion therewith are unsupported by the great preponderance of evidence upon the record, and constitute reversible error throughout.

- (f) The trial court entirely avoided the issue by holding every presumption to be in favor of the defendant and against the cestui que trust; which was reversible error clear and unmistakable (Assignments of Error I and II, tr. p. 170).

That the presumption should be in favor of the complainants is too elementary to be even discussed.

III.

THIS TRUSTEE'S ACCOUNTING UPON THE TRIAL.

This Trustee's Showing Utterly Insufficient to Establish the Integrity and Correctness of His Figures in the Face of the Explicit and Direct Showing of Error, Fraud, Undue Advantage and Gross Inadequacy of Consideration and the Burden of Proof Placed Upon Him in Equity by His Fiduciary Relation and Sale to Himself and Personal Profits From the Trust Fund in His Exclusive Control.

This trustee having failed to establish the correctness of his representations and figures to the complainants and having failed to keep proper books of account of the trust fund and having commingled the trust funds with his own personal funds, should be charged with the full amount of the principal consisting of the trust fund, or at least with its inventoried cost, \$45,954.48, with interest thereon less the amount he has already paid.

It is manifest error on the face of the record and the District Court erred in deciding and holding that the defendant had fully established the integrity of his figures and that no fraud or error had been shown or undue advantage taken by himself as trustee, and that the defendant's sales slips had not been impeached, and that the burden of proof rested upon the complainants, and in its dismissal of their bill before the Court.

In this regard the complainants respectfully cite to your Honors their assignments of error at pages 170 to 210 of the transcript, and numbered therein from I to XLV.

(1) Isaacs' So-called "Cash Book" (Defts. Ex. C).

- (a) Not a proper book of account by a trustee of a trust fund but in fact a highly sophisticated one and no more authentic than his sales slips.**

In an effort to bolster up his false returns of the trust fund this trustee produced a memorandum book with pencil entries mixed up with a lot of other accounts. The defendant's own witness Herrick said it was a crude, primitive book, "an abominable accounting",⁶⁰ and not properly a "cash book", also that *its entries are made in lead pencil*⁶¹ and are not a record of each individual sale;⁶² and there is no check or audit by means of which it can be determined if its entries represent the entire cash sales. Herrick testifies its entries are only correct upon the "*assumption*"⁶³ that they represent all the sales and he has no way of determining if they do.

(b) Not a complete record.

MR. OLNEY. Q. If this book is made up from the total cash in the drawer each night at the conclusion of business, then is it not also an incomplete record in that it might not show the sums of money taken out during the day, or not put in the drawer during the day?

THE COURT. I do not think it is necessary to ask an expert witness to deduce conclusions which are inevitable. If money was taken out of there, the book, of course, does not show it. His conclusions do not amount to anything. You are asking

(60) Tr. p. 141.

(61) Tr. p. 134.

(62) Tr. p. 136.

(63) Tr. p. 242.

him to deduce a conclusion which is self-evident to any man.”⁶⁴

Thus *it is not a record of the cash taken out of the cash drawer during the day; nor is it a record of the cash not put in the drawer during the day; therefore it is not a complete record of all the sales, for this trustee paid all expenses out of the cash receipts in the cash drawer; and hence these expense items do not figure in the making up of this “cash book”.*

If the “cash book” totals correspond with the sales slip totals (and the most Mr. Herrick can say is they “appear” to “unless they are false”⁶⁵) it shows the cash sale entries therein are not a complete record for many sales slips were depreciated and many are missing, as we will show in detail later and as Seynei⁶⁶ and Isaacs⁶⁷ himself testified, and the figures of Klink, Bean & Co. prove; and we estimate this shortage alone at several thousand dollars worth of merchandise, the receipts from which evidently were not put in the cash drawer at all but concealed in Isaacs’ safe deposit box and probably forwarded to San Francisco by express.

(c) **No one saw its pencil entries of sales but the defendant.**

It is also interesting that its pencil entries of sales (p. 68) *are made exclusively by Isaacs.* His own manager, Mr. Seynei, testifies:

“I never saw any books kept by the defendant on that sale. I handled the sale for him and would

(64) Tr. pp. 140-141.

(65) Tr. pp. 131-137.

(66) Tr. pp. 50-51.

(67) Tr. p. 151.

have had knowledge if any books were kept, but I did not see any books.”⁶⁸

Mr. Jeremy, Isaacs’ head salesman, testifies:

“The defendant did not employ a bookkeeper or cashier on his sale for these complainants, only his wife and daughter were employed as such. The defendant and his family handled all the cash. I did not see any books being kept of the insurance sale.”⁶⁹

Isaacs testifies:

“They had not arranged for a cashier and I asked my wife and daughter to act as such.

“On the 5th of September, 1913, accompanied by my wife and daughter I returned (from San Francisco) to Seattle.”⁷⁰

Isaacs thus took his wife and daughter all the way from San Francisco to Seattle, *one thousand miles*, to act for him as cashier to thus keep secret the amounts of monies from the complainants’ sale.

Isaacs would hardly pay out several hundred dollars to take his wife and daughter from San Francisco to Seattle to work in the Bridge store there for only three weeks without some hidden motive for personal gain, especially in view of his testimony—

“I made no charge for the services of my wife and daughter.”⁷¹

Mr. Seynei testifies:

“The sales tags were taken possession of every evening by the defendant and his wife and daugh-

(68) Tr. p. 50.

(69) Tr. p. 77.

(70) Tr. p. 143.

(71) Tr. p. 154.

ter. On the sale for the complainants, the retail sale, the cashier was Mr. Isaacs, Mrs. Isaacs and Miss Isaacs.’’⁷²

In this regard I call your Honors’ particular attention to the fact, Isaacs did not produce on the stand his wife as his cashier to verify his accounts and for cross-examination by the complainants.

Mrs. Cohn, his daughter, testifies that the cash in the drawer was only counted occasionally; that she had nothing to do with this “cash book”; that she had no way of knowing of the amounts put in this “cash book” and did not know whether at that time they corresponded with the sales slips;⁷³ thus this trustee’s own daughter was not allowed to see the entries made in his “cash book”.

I can but refer to these daily sales entries in this little memorandum book, in the words of Judge Lacombe referring to a somewhat similar situation—*In re Feldstein*, 115 Fed. 262—

“He alone kept them; the bookkeeper never made a single entry in them,—never saw them. They were kept secret and apart,—his private, personal memoranda; always in his personal custody, concealed from everyone. This certainly is not the ‘(keeping) of books of account or records’ which the bankrupt act calls for. They were no more a part of such books or records than if the bankrupt had noted his indebtedness to his family on the back of a visiting card and kept it in his pocketbook, or had written it on the fly leaf of a book in his library.”

(72) Tr. p. 50.

(73) Tr. p. 161.

A mysterious "Mr. Bass" is shown by the defendant's evidence to have made the *expense entries*; but he was *not produced upon the trial* for cross-examination nor sworn to establish the accuracy of the "cash book", therefore we have as to that the self-serving assertions of this trustee alone, which can hardly be said to be sufficient to establish affirmatively this highly "abominable record".

Upon an accounting the burden is upon the person having charge of the bookkeeper to produce him.

Sandford v. Embry, 151 Fed. 978.

(d) His "cash book" a Chinese puzzle.

It is like what constituted one of the earliest puzzles in metaphysics, the apparent paradox of identity with diversity. This book offered the Court bears every evidence of having been confused purposely; it bears every earmark of fraud, insertion, obliteration, alteration, and padding.

And if it is the same book that Mr. Herrick says he examined some weeks before the trial it must have even strained his loyalty to his employer to have overlooked all these most apparent earmarks of fraud.

But this book was *not* the same that Herrick examined three weeks before the trial, for he testifies:

"The 'report' is made up from these slips and books exactly as I originally found them."⁷⁴

"I found a salary expense account in the book (Defts. Ex. C) just introduced in evidence. *Neither the names nor purported names of clerks are*

*therein given nor the amounts of salaries paid. The record is merely that all disbursements are made—specified as of one character or another.”*⁷⁵

But *Isaacs* testifies, referring to these entries in this “cash book”:

“Part of them were made before I got there and then when I arrived, *the names of the various employees were entered there*, and Mr. Seynei told me how much to pay to these various employees; he entered them in the book—stood alongside of me at the desk Saturday night when we paid off the help, Mrs. so-and-so so much, and that money was handed to that lady—*then he would enter her name and the amount.*”⁷⁶

Mr. Seynei testifies he “never saw any books kept by the defendant on that sale”.⁷⁷ *Isaacs* on the stand must have been in a state of mental stampede, for his own witness Herrick thus betrays his false “cash book” and proves conclusively that the entries *now* appearing therein were either written in and manufactured *after* its examination by Herrick—or *else is a different book entirely*. The present book (Defts. Ex. C) in evidence before your Honors *has* “the names or purported names of clerks therein given and the amounts of salaries paid”; items which Mr. Herrick even in his excessive zeal was totally unable to find at the time of his personal examination of it.

To quote the words of Judge Van Fleet in regard to this same defendant relating to his manufacture of

(75) Tr. p. 133.

(76) Tr. p. 147.

(77) Tr. p. 50.

evidence pertaining to a portion of this same trust fund:

“The testimony in behalf of defendant here of a contradictory—and I might add a more sinister—character is such as not only largely to destroy the value of the evidence of the defendant himself but of several of his witnesses. I am not at all satisfied in my mind that these purported books of account that have been put in before the Master and again on this hearing have not been sophisticated from start to finish. I have the evidence before me of the defendant himself that one book, ‘Exhibit D’, that he relied upon as an exhibit before the Master as a book made in the due and ordinary course of the transactions as they occurred was purely manufactured—made up for the occasion—after the suit was commenced and in the face of the litigation itself.”⁷⁸

- (e) This “cash book” unsupported and evidently adjusted for the purposes of this accounting—“after the suit was commenced and in the face of the litigation itself”.

The daily cash sale entries do not correspond accurately with the daily slips or the daily bank deposits—not in one single instance. Even this trustee’s well known and skilled juggling with figures was not able to make all these figures correspond as they should, for *prima facie* they appear to have been all written in at one sitting.

In short his “cash book” stands unsupported. It is not a record of the individual sales but contains a few totals made in lead pencil by Isaacs and which were easily adjustable, and the fact of their including

(78) Herein p. 139.

the spurious sales slips and excluding the monies paid out of the cash drawer, shows that they have been adjusted and are false and untrue; and the fact that the expense items are sophisticated and evidently manufactured and padded shows that they are in the words of the bill "false and untrue".

It was the duty of this trustee to keep proper books of account of the trust fund of the complainants' merchandise in his hands and his failure to do so, or I might say his even more sinister methods, is a strong presumption against him; and the trial Court erred in not so holding and deciding.

I respectfully request a personal examination by your Honors of this Defendant's Exhibit C, as the book speaks for itself, and is before this Court.

In this regard I refer to Assignment of Error XXXV (Tr. p. 204) as its reception in evidence and acceptance by the trial Court as a proper book of account by a trustee was manifest error. In the absence of proper books of account this trustee should have been charged with the full value of the trust fund; and the trial Court erred in not so charging him as cited in Assignment of Error XXXVI (Tr. p. 205) and Assignment VI (Tr. p. 131).

(2) Isaacs' Expense Account.

(a) Its items are out of all proportion to the receipts.

The expense items represented to the complainants as having been paid out by Isaacs as shown by his statement set forth in the bill for their three weeks'

retail sale *are out of all proportion to the receipts*, and being for the most part unsubstantiated by original vouchers, are open to the broadest scrutiny and criticism.

On this sale of 19 days the total sales were purported to be \$17,807 and the total expenses were \$7531.

In other words, these complainants only received \$10,276 net, *at retail*, for merchandise inventoried at \$21,301 at Bridge's wholesale cost prices, being about 53% less than the original cost; or some \$6000 *less than they paid for it in bulk at wholesale* a few weeks prior; and the best of the merchandise was sold at this retail sale.

(b) Isaacs corroborates Seynei as to the actual labor expenses being far less than his purported \$1655.

Mr. Seynei testified the amount of this trustee's expense account was exaggerated and exorbitant compared with his own sale of H. C. Seynei Co., and that no such amount was paid out to the best of his knowledge.

"The first day of that insurance sale there were thirty or thirty-five clerks employed. Towards the end of the sale these were reduced to about fifteen in all; ten men and five ladies. The average amount paid the clerks was \$15 and up a week for the men, and \$9 to \$12 for the ladies. The defendant's statement to the complainants (Plffs. Ex. 2 (Q')) charging up some \$1655, or \$551 a week clerk hire against them looks to me as an exorbitant amount for clerk hire. To the best of my knowledge there could not have been more than \$800 paid out for clerk hire; there was only one or two days they had extra help and they

were not expensive help; they did not require expensive help for that sale.”⁷⁹

So this statement that not more than \$800 could have been paid out for clerk hire, averaging \$266 a week, is absolutely corroborated by Isaacs’ own statement on the stand, that *the labor the first week was \$270*.⁸⁰

(c) **The Seynei books expose the falsity of Isaacs’ expense account.**

These Seynei books are in evidence and were kept by a professional bookkeeper; they are elaborate and show this trustee’s different method of careful bookkeeping for himself and, to say the least, the loose bookkeeping for his principals. The Seynei books show that the expense for the Seynei sale for *seven (7) weeks* (Compls. Ex. 18) was only \$3133,⁸¹ or \$447 per week, and it was conducted at the same location with the same rental per month and same lighting and clerk hire, as against \$3973, which does not include commissions of \$3560, or \$1324 per week running expenses at the *three weeks’* sale of this trustee for the complainants. In other words, when conducting a sale for himself under exactly the same conditions Isaacs’ running expenses were \$877 less per week than when conducting the sale for these complainants.

(d) **Isaacs’ own testimony shows his expense account must be padded.**

The clerk hire for Isaacs’ firm of Seynei & Co. was \$1264 for *seven (7) weeks*, or \$180 per week, as against

(79) Tr. pp. 51-52.

(80) Tr. p. 147.

(81) Tr. p. 227.

Isaacs' purported clerk hire of \$1655.21 against the complainants for three weeks, or \$551 per week. Isaacs testifies his labor at the insurance retail sale was \$270.11 for the *first* week, which, according to his purported total in his cash book of \$1655.21, would make the second and third weeks average \$692 per week, but as the number of clerks were reduced this shows that Isaacs must have padded the amount of the clerk hire or the labor entries the second and third weeks, and thus the non-production of Mr. Bass becomes even more significant.

Isaacs testifies the running expense at his sale for these companies averaged 23% and a fraction; but at the same time swore that at a sale like the Seynei sale the running expense should be 25% to 26%—sometimes 30%; thus out of his own mouth the insurance sale expense should have been lower instead of 30% higher per week than the sale for his own partnership.⁸²

This impeccable trustee was careful upon his sale for these companies to take no receipts at all from the clerks for these amounts on that three weeks' retail sale but was very diligent to take receipts from them on his own thereafter for H. C. Seynei & Co.⁸³

(e) He fails to produce his bookkeeper.

Isaacs was very careful upon the trial not to produce the mysterious "Mr. Bass" to substantiate his "cash book" entries (lead pencil) of these expenses, although

(82) Tr. p. 154.

(83) Tr. pp. 52-77.

he claimed them to have been made by "Mr. Bass". The purported vouchers for these expense items were copies, not originals, without the originals being accounted for, and Herrick's "report" shows that these only "appear to represent actual and proper payments"⁸⁴ and do not always correspond with the items in his statement to the companies or are missing entirely. Herrick testifies "the expense items are only partially supported by vouchers."⁸⁵ The voucher, in fact, for the rent shows the rent was not paid at all by Isaacs but "by the adjusters", a discrepancy alone of \$920.⁸⁶

It is incredible to believe that any such amounts as shown by Isaacs' expense account were ever actually disbursed, being so greatly in excess of the amounts actually paid out by Isaacs in his own business under similar conditions; yet, the District Court held this trustee to have successfully established every item in this account as correct prior to his clandestine sale in bulk to himself of the balance of the complainants' merchandise.

We claim the trial Court erred in its decision (as cited in our Assignments of Errors XXXVII and XXXVIII)⁸⁷ in holding that every item in this expense account was satisfactory and fully established, and also erred in accepting copies of vouchers without the originals being accounted for, and also in permitting

(84) Tr. p. 241.

(85) Tr. p. 133.

(86) Tr. p. 133.

(87) Tr. pp. 205-6.

the paid expert to give an opinion (based upon the self-serving assertions of Isaacs by word of mouth before the trial) as to whether the defendant had made a satisfactory accounting. That was for the Court to determine.

(3) His Bank Statement—Complainants' Exhibit D.

- (a) This trustee commingled the trust fund with his own personal funds. His own and his sister-in-law's testimony proves the complainants' monies were not all deposited in the Seattle National Bank but must have been concealed elsewhere.

Herrick's purported "report" claims that Isaacs only deposited in the Seattle National Bank during the period of the insurance sale at retail \$19,744.26.⁸⁸

The testimony of the auditor of the Seattle National Bank shows that this trustee actually deposited \$20,744.26⁸⁹ during the period he claims to have taken in only \$17,800 for the complainants.

Isaacs admitted on the stand to having commingled the trust fund with his own personal funds and to having deposited during the period of the complainants' retail sale his own personal check amounting to a thousand dollars and other

"checks for merchandise sold *at different places on different sales*".⁹⁰

Mrs. Benzoin who managed the North Yakima sale for Isaacs testifies she sent him at Seattle during this period nearly \$7000 in checks from the North Yakima

(88) Tr. p. 248.

(89) Tr. p. 219.

(90) Tr. p. 156.

sale alone.⁹¹ *Her testimony remains uncontradicted and unimpeached upon the record.*

Thus there was over \$8000 in checks available for deposit.

(b) **Isaacs' bank account shows a deficit.**

Herrick claims that from the \$17,807.92 purported cash sales only \$15,978.72 was available for deposit.⁹²

From the foregoing evidence it will be seen the amount of *checks* available for deposit was over \$8000, thus making in all over \$23,978.72 available for deposit, which is \$3234.46 *more* than his deposits of \$20,744.26 actually show; i. e. his bank account *shows a deficit of over \$3234.46*. It must be remembered we have not taken into account the "checks for merchandise sold at different places on different sales" nor the depreciation of the cash sales, the amounts of which if known would no doubt increase this deficit many thousand dollars more.

To make perfectly clear the significance of his shortage, I will put it this way:

Isaacs' total deposits were	\$20,744.26
The foregoing evidence shows the amount of	
his checks <i>known to be deposited</i> , to be	8,000.00

Leaving the amount actually deposited from

the complainants' cash sales—only	\$12,744.26
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which is \$3234.46 less than the amount (\$15,978.72) claimed by Herrick to be available for deposit from the complainants' retail cash sales.

(91) Tr. p. 166.

(92) Tr. p. 250.

Thus I have demonstrated that Isaacs did not deposit all the monies available from the cash sales and his motive in confusing and commingling the trust fund was for the direct purpose of hiding monies from the cash sales and of concealing the exact and true amount taken in upon that sale, for the amount concealed was in reality far greater than \$3234.46.

Herrick claims that from \$17,807.92 purported cash sales only \$15,978.72 was available for deposits, as Isaacs informed him orally out of Court that \$2192.90, as part of the \$3973.60 expense items, were paid by check, although he did not see these checks nor could he state that he had any basis for his conclusion to show that these items were paid by check save Isaacs' self-serving declarations in a conversation out of Court some weeks before the trial.⁹³

The complainants claim that the amount available from cash sales for deposit was greatly in excess of \$15,978.72 and that Isaacs concealed these excess returns, and that the expenses, \$3973.60, were all paid out of the cash drawer, as it would be most natural to do as there always was a large amount of cash in the cash drawer available for incidental expenses, thus the real deficit would be greater still than the \$3234.46 shortage apparent from Isaacs' depreciated returns from complainants' retail sale.

It may be called to the Court's attention also in passing that *these amounts paid for expenses out of the cash drawer were of course never banked*,⁹⁴ also

(93) Tr. p. 243.

(94) Tr. p. 52.

that they were not *included* in the *cash book entries* of the total daily sales.⁹⁵

**(c) Isaacs conceals checks available for deposit from his
his own accountant.**

Herrick testifies he did not examine Isaacs' bank books or check books and that these were not presented to him,⁹⁶ but for information he relied upon a statement and deposit slips purporting to be from the Seattle National Bank but which were excluded by the Court as being copies and not originals and not verified by the bank;⁹⁷ therefore his only knowledge of the number and amounts of checks deposited was from selected data and information furnished him out of Court by Isaacs which constituted the only basis for his conclusions.⁹⁸ The only checks produced by Isaacs were four checks from North Yakima drawn on the North Yakima Bank *and amounted to only \$2850*. He concealed and made no mention of the balance of \$4150 from the \$7000 sent him in checks from North Yakima by Mrs. Benzoin; nor of the other "checks for merchandise sold at different places on different sales", which he admitted on the stand he deposited in the Seattle National Bank.

(d) Isaacs cornered.

It can readily be seen that if he had informed Herrick of all the checks actually deposited by him

(95) Tr. p. 141.

(96) Tr. p. 139.

(97) Tr. p. 157.

(98) Tr. pp. 142-243.

during this period, his bank account would have shown an embarrassing deficit of many thousand dollars and would have proven that Isaacs did actually conceal monies from the complainants' retail sale (presumably in his safe deposit box⁹⁹) for checks must be deposited for collection.

But this wily trustee, hoping to cover up his fraudulent manipulation of the trust fund, concealed from Herrick the real amount of checks deposited (over \$8000.00) and produced only these four cancelled North Yakima checks amounting to but \$2850;—and thus the astute Herrick is able to create an *apparent excess* in his employer's bank account.

(c) **His accountant Herrick claims an excess of \$915.54 which he cannot account for from the data offered.**

I have shown this excess claimed by Herrick is not based upon all the facts or all the evidence in the case but is a mere manipulative jugglery of figures under the eminent direction of "Mr. D. Isaacs".

Mr. Herrick in his purported report to bolster up his client's "abominable record" claims an excess of \$915.54 in Isaacs' bank deposits over and above the four exclusive North Yakima checks of \$2850 and the amount of \$15,978.72 available for deposit from the cash sales, and which he admits he could not reasonably account for except again for this indefatigable method of the defendant for—private explanations—weeks before the trial that he made other deposits, and so commingled the trust fund with his personal

cash. The evidence shows those other deposits were far in excess of \$915.54. *Mr. Herrick dismisses this small(?) excess of \$915 by saying it is of little importance.*¹⁰⁰

We claim that any excess money in bank unaccounted for whether \$915 or more shows clearly that this trustee received more money than he represented to these complainants to have received, or accounted for, and is of importance and is one of the reasons why this accounting was demanded.

We have proven this trustee's bank account in reality shows a deficit, and that he must have had another secret bank account, or else deposited currency of the complainants in his safe deposit box and which in some way was shipped to San Francisco leaving no trace behind or record in Seattle.

Although he had an account in the Seattle National Bank, and the use of Mr. Aronson's great safe next door, this impeccable trustee rented the day he opened his sale for these complainants a safe deposit box with an obscure private banker and visited it an average of three times a week during that sale at retail, and where he confessed to having deposited cash from this sale.¹⁰¹

Thus does Isaacs not only fail to account for his entire bank deposits but also for this money of the complainants hidden away in his private deposit box.

(100) Tr. p. 244.

(101) Tr. p. 92.

At every point we are met by this trustee with the greatest attempt at concealment and chicanery. There is nothing accurate, concise, or above-board. Nothing in his accounting proves up or checks up. Neither his sales slips, cash book or bank deposits verify the integrity of his purported total sales of \$17,800 or show the true and correct amount of the retail sales. His whole effort is to make such a haze of his handling of the trust fund that the Court will not be able to penetrate it. This camouflage completely obscured the discernment of the lower Court.

(4) Isaacs' Sales Slips.

(a) This trustee fails utterly to establish their integrity.

This trustee, in an effort to substantiate his figures and totals, offered in evidence a selection of some ten thousand loose leaf sales slips purporting to be the actual slips for sales of the complainants' merchandise at their retail sale of 19 days.

In certain instances these slips are sophisticated and manufactured for this cause; and are incorrect not only as to the amount of sales and number of articles sold but directly impeach the amount of the cash sales. They are loose leaf and nothing to show those in evidence are all the same as of the time of sale three years prior to the trial.

(b) He withholds all evidence by which his sales slips can be checked up.

There is no way of checking them up; no salesmen's indexes or adding machine totals or cash register totals,

or original sales tags, all these means of checking them up having been either withheld or destroyed by the defendant, yet these were made daily.

Mr. Herrick testifies on the stand as follows:

“Mr. OLNEY. Q. You did not compare each separate sales slip?

A. There is nothing to compare it with.

Q. That is what I thought.

A. What could there be that they could be compared with, unless there was a complete record of the individual sales?

Q. There is no complete record, is there?

A. No, there is none.

Mr. SCHLESSINGER. Except as appearing on the slips themselves?

A. Well, there is nothing appearing on the slips themselves except a showing of the sales that they are presumed to evidence.

Q. Did you also see the original adding machine totals of the slips? A. No.

Q. Or cash register totals?

A. No, nothing except what I have referred to.

Q. Then you saw no other records than these slips and these books? A. No.

Q. If any slips were missing, Mr. Herrick, they were not entered in the book, were they? You do not know how many slips were missing, do you?

A. No, I don't know whether any slips were missing or not.

Q. You simply made up your report from the slips that are here? A. Yes.”¹⁰²

And in regard to the salesmen's indexes he says:

“Q. It is the chief record to check the sales record?

A. Yes. It is the means of carrying out the check of individual sales to the complete recapitulation.

Q. It also checks up the sales slips, does it not?

A. Yes.

Q. Your report, I believe, does not include these indexes? A. No.

Q. There were none such furnished you?

A. No.

Q. I believe you also stated you did not have furnished you any of the original adding machine totals or cash register totals of these sales by which they could be checked up? A. No.”¹⁰³

Thus the witness, Herrick, in whose “report” the defendant places his sole reliance upon his accounting, says he has no way of proving if all of the sales slips of the retail sale have been produced as he has nothing to check them up with, and that some may be missing, and that the salesmen’s indexes originally accompanying them are the chief means of check and audit upon their accuracy, and these have not been furnished him by the defendant, and that therefore the selection of sales slips produced by Isaacs are an incomplete record; and that he cannot check them up individually with the “cash book” (Defts. Ex. D); and that his “report” is only correct upon the assumption that all the sales slips were presented to him,¹⁰⁴ and upon the integrity of those produced.¹⁰⁵

The witnesses, the salesmen, said that during the rush hours often no sales slips were made out at all on the insurance retail sale, there wasn’t time.¹⁰⁶

(103) Tr. p. 138.

(104) Tr. p. 242.

(105) Tr. p. 241.

(106) Tr. p. 50.

Mr. Jeremy explained how the salesmen's indexes made out each day by salesmen indicating their total amount of sales, and the total number of sales, checked up the cashier or manager as well as the sales slips.

“Mr. OLNEY. Q. Now, Mr. Jeremy, I want you to explain to the Court how an agent or cashier by losing or destroying these sales indexes which have been referred to on this trial, could profit. Just take this book and take this package of sales slips at random and explain to the Court how that could be done.

A. These sales slips were furnished to us the first day of our sale. On that day we were given a sales book. The clerk's number was on the left and the date on the right. A carbon was inside of the two; both went up to the office together; one went to the customer and the other remained in the office with the cashier. The indexes showing the total number of sales were totaled up for the day by the salesman. If 17 sales were made we totaled up on number 17 in the index. On the next day, the second day, we got a new book; and on the next or third day we got the old book back again we had on the first day, with a new index which indicated the number of sales you sold on the first day whether it was 75 or 13 or 24. We never went by the book; we simply went by the index. If there were 6 or 7 sales slips missing from the book, we had nothing to show; we simply had the index for the receipt.”¹⁰⁷

Thus by destroying these indexes a manager or cashier could destroy or lower the amount of any number of sales slips, and so conceal the actual amount of cash, and there would be no way of checking them, *or him*, up.

Why should Isaacs preserve 10,000 sales slips and not one single adding machine total, or a single index, nor cash register total, nor original sales *tag*, by which his collection of slips could be checked up? This attempt at concealment is only too apparent, and shows sophistication from start to finish; and the trial Court erred in not so holding and deciding.

Isaacs' daughter, Mrs. Cohn, who at the time of the sale was Miss Isaacs, said she had not seen the sales slips since the time of sale three years previously,¹⁰⁸ therefore it could not be possible for her to know if the sales slips in evidence were the same as those on hand at the time of the sale, or whether the unproduced salesmen's indexes would check up the sales slips actually produced in evidence now. The defendant has carefully seen to that. He has withheld or made away with all proof by which alone the accuracy of the sales slips selected by him as serving his purpose in evidence could be determined. His daughter swears she did not check up the sales slips in her possession three years before with the cash book entries, and *did not know* whether the total amount of sales slips at that time corresponded with the cash book entries or not.¹⁰⁹

(c) Isaacs fails to account for all the complainants' merchandise. His sales slips are short.

Even these loose leaf sales slips selected by the defendant for production in Court fall short in the number of articles sold. The sales slips for about one-twelfth

(108) Tr. p. 161.

(109) Tr. p. 161.

(1/12) of the articles sold are missing by the defendants' own proof. They fall short over sixteen hundred (1600) articles which are unaccounted for. His own figures not only impeach the integrity of his sales slips but show that his evidence was false and his figures manufactured, and that they do not correctly represent the number of articles actually on the sales slips, or the number actually sold, and thus exposes how he cheated these insurance companies out of thousands of dollars.

(d) **He attempts deception through false figures.**

A comparison of the articles on the sales slips, as computed by Isaacs *himself* (although he had two hired experts work on these slips) and by Klink, Bean & Co. show that Isaacs swore falsely when he testified that *more articles were on the sales slips and were sold than the sales slips actually show*;

For example:

No. of articles computed by Isaacs as sold as per sales slips for these companies on his sale for them. ¹¹⁰	No. of articles computed by Klink, Bean & Co. from the same sales slips as having been sold for these companies. ¹¹¹
Suits 470	Suits 419
Overcoats 173	Overcoats 146
Pants 895	Pants 801
<hr/> 1538	<hr/> 1366

In these three cases alone he claims his sales slips show one hundred seventy-two (172) articles more sold than they do.

(110) Tr. pp. 148-151.

(111) Herein, Appendix.

The same is true in nearly every instance throughout the entire sales slips, i. e., that Isaacs claims the sales slips show more articles sold than the sales slips selected by him for production in Court corroborate.

In a further effort to deceive the Court he becomes enmeshed in his own figures. On page 149 of the transcript he testifies that out of a total of 1577 suits his sales slips show that 470 suits were sold (Klink, Bean & Co. give 419 suits as sold), and that 1112 suits were left at the tail end of the complainants' sale—in other words there were

in the First Inventory	1577 Suits
in the Second Inventory	1112 Suits
<hr/>	
Making	465 Suits Sold

He says, however, that his sales slips show 470 suits as sold, which would indicate he sold five more than he received; but either his enthusiasm or his evil intent gets the better of his arithmetic for on the second page following he raises the number from five to *fifty-six* (56) and thus goes himself fifty-one better;—all indicating with what lightning rapidity our worthy trustee calculates and manipulates figures for his own benefit! Like results of his genius appear constantly throughout the record, but I will not further tax the patience of the Court.

(e) Proof of the shortage in his sales slips.

A comparison of the number of articles sold as per these loose leaf sales slips, and the number of articles

to be accounted for, as per the difference in the first inventory taken immediately before the sale and the second inventory taken immediately after, the difference showing the correct number sold, shows that the sales slips in evidence fall short over sixteen hundred articles (1600), *or in other words that 1600 articles were not included in Isaacs' cash sales of \$17,800 and remain unaccounted for.*

For example:

Number of articles sold as per sales slips.	Number of articles to be accounted for as per difference between 1st and 2nd inventories.
Suits 419	Suits 468
Pants 801	Pants 959
Hats 658	Hats 1005

The above shows that this trustee's sales slips in evidence fall short in the suits 49, which at \$10 a suit, cost prices, would be \$490 (and there were suits as high as \$20 in the first inventory but the high priced suits are mostly missing from the second inventory).

In the pants 158 pair are missing, which at \$5 a pair would be \$790.

In the hats there are 347 missing, which at \$2 a hat, is \$694, for it must be remembered that the evidence shows this Bridge stock to have been a *staple* stock throughout.

In these three cases alone we find that \$1,974 worth of merchandise is unaccounted for, and that thus this trustee directly cheated these complainants out of that amount,—*and there are still over a thousand articles*

more missing which should be accounted for and which would run his shortage into thousands of dollars.

Isaacs acknowledges in his testimony that his sales slips for the pants fell short 64,¹¹² (according to the accountants, Klink, Bean & Co. in reality this shortage was 158)¹¹³ also that the shirts, underwear, mittens, gloves, socks, mufflers and handkerchiefs are short,¹² and he fails to give any reasonable explanation, as also for the other shortages as shown on pages 116-117.

The trial Court entirely overlooked the significance of the foregoing admissions by Isaacs, and erred in holding and concluding that

“if we add to the last inventory (2nd.) the goods sold, as disclosed by the sales slips, we will have approximately the goods shown by the first inventory,”

for the fact is the goods have *not* “all been accounted for”;—we would at least be short *sixteen hundred and twenty-five* (1625) articles, which is *one-twelfth* (1/12) of the total number of articles sold, and whose value as I have just shown is thousands of dollars.

The first inventory was stipulated by all parties to be correct, therefore, these shortages as shown by both Isaacs' and Klink, Bean & Co.'s figures *can be accounted for in only two ways*—either

the sales slips for these articles were *not included*,
i. e., that they were *destroyed* or *withheld*, and did

(112) Tr. p. 151.

(113) Herein p. 113.

not enter into the computation of these *purported* \$17,800 cash sales—

or else

the second inventory was *depreciated* to that extent, i. e., *these articles were left out entirely*.

In either case these complainants were directly defrauded by this defendant.

The second inventory was made by Isaacs at the close of the retail sale for his own percentage bid of 45% (lowered from 47%).

Main testified that it was his understanding that the second inventory *was taken on the same basis as the first*; that everything was included and that there was no depreciation allowed for any damaged merchandise, and that the 45% bid included the damaged merchandise as well.¹¹⁵

Mason testified that the merchandise of no value was all on one or two tables, that its sum total was only from \$300 to \$700, *and that it was all entered in the first inventory*.¹¹⁶

Mr. Seynei¹¹⁷ and Mr. Jeremy¹¹⁸ testified that the merchandise badly damaged was all on one or two tables and did not exceed \$500; that practically all the damaged merchandise was marked and put on sale.

Mr. Meyer testified that even the furnishings, shirts, collars and underwear, that were smoked and smelled

(115) Tr. p. 122.

(116) Tr. p. 118.

(117) Tr. p. 45.

(118) Tr. p. 79.

badly *were marked and sold above cost*.¹¹⁹ The evidence was all to the effect that the damaged merchandise was reconditioned and sold.

The first inventory shows that only 216 articles were a total loss, and that these at cost were valued about \$500.¹²⁰

The first inventory was made out under Mason, the adjuster for the assured to whose interest it was that the loss should be estimated and exaggerated as much as possible, as this first inventory was a basis for estimating the loss; yet Mason can only find 216 articles a total loss as against the 1625 articles unaccounted for by Isaacs.

For example:

The first inventory taken by Mason as a basis for estimating the loss, reports the following:

No suits marked damaged.
33 prs. pants marked total loss
48 hats badly damaged
No gloves or mittens marked damaged. (These were kept in cases and boxes in the Annex and could not possibly have been reached by anything.)
37 Sweaters total loss
130 Shirts and underwear total loss
16 Union suits total loss

The shortage as shown by a comparison of Isaacs' sales slips and the difference between the 1st and 2nd inventories is the following articles missing and unaccounted for:
49 Suits
158 prs. pants
347 Hats
127 Gloves and mittens
160 Shirts and underwear

(119) Tr. p. 90.

(120) Tr. p. 233.

	136	prs. socks	
	50	Mackinaw and oil coats	
	92	Overalls and jumpers	
	118	Neckwear	
	155	Handkerchiefs and muf- flers	
	8	Umbrellas	
	24	Aprons	
	63	Arm bands and garters	
	8	Belts	
	130	Miscellaneous	
Articles total loss.....	216	1625	Total
“ badly damaged....	48		
	—		
Total	264		
Total value as per 1st inventory	\$558.20 ¹²⁰		

This total *includes* the spurious sales slips manufactured by Isaacs. If these spurious sales slips were excluded, the number of articles unaccounted for would be greatly increased; for instance 100 suits, 52 pants should be added to the above shortages.

From the foregoing evidence it will be seen that the number of articles totally damaged was infinitesimal; that practically all the damaged merchandise was saleable, had a value, and was actually sold; for Isaacs also testified the damaged underwear was sold at various prices. Therefore these 1625 articles, as shown to be missing and unaccounted for, must have been sold and the sales slips destroyed or withheld and did not enter into the aggregate of the \$17,800 purported cash sales.

(f) Isaacs introduces spurious sales slips.

From a further examination of these sales slips Klink, Bean & Co. report over one hundred sales slips as not bearing dates relative to the sale and representing alone

as sold 100 suits, 17 overcoats, 52 pants.^{120a} In fact many more slips have no dates, no clerk numbers, and are not correct serially, *and have nothing to identify them as belonging to this sale.* This shows conclusively that these sales slips have been padded and many manufactured, and which it would even tax Herrick's "purported purports" to whitewash. It is quite evident these slips were not made out during the 19 days of the insurance retail sale, and therefore cannot be included in the slips for that sale. It is only too apparent these spurious "sales slips" produced in Court by this trustee are an eleventh hour attempt to bolster up his sales slips by any means whatever, trusting to luck that among 10,000 sales slips, they would not be discovered. The fact that these purported sales slips should have all been preserved so carefully, but not one single adding machine total or cash register total of them, or one single solitary salesman's index by which alone their integrity could be ascertained, is a strong presumption in equity against this trustee as their producer.

As for these hundred or two undated sales slips unconnected with the sale, it is interesting that the total amount of these spurious sales slips aggregates some hundreds of dollars, and should not be included in the total amount with the other sales slips; thereby proving conclusively Herrick's purported total of \$17,800 of these sales slips to be incorrect and based on false data; and also proving conclusively that Isaacs' figures

(120a) Herein, Appendix.

and penciled entries in his so-called "cash book" are sophisticated.

The main thing, however, out of all this haze produced by this trustee to hide his own misappropriation from these complainants, is that sales slips were not only manufactured and depreciated, but also that many are missing from the selection furnished the Court for evidence, and that his representation to the complainants in his statement to them of only \$17,800, realized from their merchandise at retail, does not represent the true amount of sales.

(g) Complainants' various impeachments of the defendant's sales slips.

By the review of all the foregoing evidence your Honors will have observed that your complainants have impeached their trustee's sales slips in the following various ways:

(1) His total amount of sales (\$17,800) as shown by his sales slips was 20% below the original Bridge wholesale cost prices as given in the first inventory for this same merchandise; while the evidence of *five* of his own salesmen, and of Mr. Bridge and Mr. Bailey, showed that the merchandise on the insurance retail sale was marked and sold on an average of 20% *above* the same inventory cost prices.

Therefore if Isaacs' sales slips only aggregate \$17,800, which is 20% *below* the original Bridge cost, they could not possibly be correct, or all be in evidence, for upon that basis there would be a difference in the selling estimates of 40%, which would indicate the mer-

chandise was sold for 40% less than these *seven* disinterested witnesses have sworn to without contradiction from the defendant. Such wide variance refuses belief.

(2) The evidence of Messrs. Mason, Main, Seynei and Jeremy, was that such a stock at a fire sale should bring 20% to 50% more than at an ordinary sale.

(3) Mr. Mason testified that this stock should have sold at inventory prices; that the best would sell first and should bring way above inventory prices.

(4) The mute evidence of the Seynei books is that after the best of this Bridge merchandise had been sold at the insurance retail sale, the balance of the same stock sold at the sale for Isaacs' partnership of H. C. Seynei & Co., brought *10% above* the same inventory cost.

(5) The evidence of Mr. Jeremy, Mr. Seynei, Mr. Bridge, and of Mr. Bailey as to admissions of the defendant to them before the close of the insurance retail sale, was, that Isaacs *before that sale closed* told them and others that he had already "*made good his guarantee (\$18,100), his commissions, and all expenses, and was on velvet.*"

(6) The evidence of the Seattle National Bank by its auditor, as a witness, *shows over \$4,000 more money deposited* by this trustee during his sale at retail for the complainants *than the amount purported by his selected sales slips* offered in Court, less clerk hire; not to mention sums in currency probably deposited in

his private safe deposit box with Wm. D. Perkins & Co., private bankers.

(7) The evidence is that the sales entries in the "cash book" made by Isaacs are not a complete record of all the sales.

(8) The evidence of Mr. Seynei was that during the rush of the first few days and whenever they were very busy, *sales slips were not always made out as there was no time.*

(9) The evidence of the defendants' own witness, Herrick, was that these slips were not a complete record of all the sales.

(10) The evidence shows the original cash register totals, the adding machine totals, and the salesmen's indexes by which alone these slips could be checked up, to be missing, and their absence and non-production not satisfactorily accounted for by the defendant. His witness, Herrick, testified that these salesmen's indexes are the chief check on sales slips. The evidence was that all these existed at the time of the insurance retail sale.

(11) The fact that the sales slips themselves show that many articles (1625) remain unaccounted for, including 49 suits, 158 pairs of pants, 347 hats, etc., and that many sales slips are sophisticated is corroborated by Isaacs' own evidence and by Messrs. Klink, Bean & Co.

(12) The fact, that never throughout the entire history of the selling at retail of this whole stock does its selling value fall below its Bridge first inventory

values, except in Isaacs' purported returns upon this retail insurance sale for these complainants, for which sale these ostensibly are the sales slips.

Yet, despite all this mass of facts, figures, and direct, concise evidence by the complainants as against Isaacs' lone, self-serving assertions, the District Court held that these sales slips had not been impeached! (Tr. p. 40.) Such decision and holding seems incredible and we cite it here and in our Assignments of Error XXXII (Tr. p. 189) as error of the most pronounced type, and respectfully request this Court to reverse it and that the lower Court's decision be revoked, as it was not based upon the correct facts or the actual data in evidence, but upon this trustee's own (false) statements and the assumptions of his hired expert based upon them.

(5) Herrick's "Purported" Report.

- (a) This "report" was prepared upon a wrong hypothesis and false basis, upon insufficient data, and upon excluded data which the Court refused to accept or receive in evidence.

Its author testifies "it is correct upon the basis upon which it is prepared".

Perhaps psychologically the most interesting of all the self-serving data furnished the Court by this trustee is the "purported" "report" of Herrick, the accountant, employed by defendant's counsel, who appears not only as an expert on figures but also upon honesty and integrity, who seemingly dismisses as of no importance the first half of the good old maxim, "Liars may figure but figures don't lie."

This "report" is one of the rarest bits of humor found in the law; certainly unequaled since the time of Charles Dickens and the immortal Pecksniff; and though it should never have been received in evidence under any principle of law or equity, it is fortunate that the lower Court has preserved it for your Honors' delectation.

Mr. Herrick naively clears his skirts by announcing at the start, that the report is only "correct upon the basis upon which it is prepared,"¹²¹ i. e., upon the data furnished him *ex parte* by Isaacs, and then proceeds to qualify by saying that he does not know whether all the data was furnished him, and in fact that it was not all furnished him; and that in fact these omissions and commissions were explained to him by oral conversations with his employer some weeks before the trial. Thereupon he proceeds to give his employer a clean bill of health, and states as his personal opinion that Isaacs' figures "unless they are false"¹²² are correct; and thus proved his employer's integrity to the satisfaction of the lower Court. Almost the entire "report" is an opinion or a conclusion of this accountant, that the records "appear" and "purport" to be so and so, and "unless they are false" they do this and that. The records, of course, are "false." At no time in making up his conclusions does he speak of facts but always of suppositions; and we respectfully refer the Court to our Assignments of Error Nos. XXXIII, and XXXIV (Tr. pp. 192-204) as to the trial

(121) Tr. p. 129.

(122) Tr. p. 137.

Court's unquestioning acceptance of its figures and conclusions as to the defendants' own honesty and integrity based upon self-serving data selected by the defendant, himself, weeks before the trial, and placed *ex parte* in his witness' hands, part of which was not accepted in evidence by the Court. Such opinion was not receivable in evidence, unless based upon a thorough review of *all* the evidence in the case, and not upon secret *ex parte* statements by the defendant to the witness alone respecting his own honesty and integrity, and to serve his own purse, regarding his dealings with the complainants.

(b) Herrick fails to establish the integrity of the sales slips.

This witness, Herrick, was largely called upon to testify in regard to some ten thousand loose leaf sales slips selected by the defendant, that is, called upon to testify *as to the amounts only*, and *not the number of articles*;¹²³ and upon cross-examination he confessed that they (the sales slips) only "appeared correct," and *that many might be missing, as he had no means of determining whether all had been furnished him as he had not been furnished by Isaacs with any means of checking up these slips*;¹²⁴ and that the accuracy of the individual sales slips was doubtful. He testified that no salesmen's indexes, cash register totals, or adding machine totals, of these slips, whereby the sales slips and purported cash entries could be checked up, had been furnished him by Isaacs, although he said these

(123) Tr. p. 140.

(124) Tr. pp. 136-8.

are always included in the usual record of each day's transactions, and that the indexes are the chief record of checking sales slips.

“MR. OLNEY. Q. Mr. Herrick, if it should appear that upon this sale for which these sales slips have been produced here there were indexes made by each clerk showing the amount of each individual sales slip, and the total cash sales, which was turned in each night to this defendant, should not these indexes be produced here and accompany these sales slips in order to make a complete record?

A. Yes. These books contain, usually, 50 of these slips with carbons and there is also in the book a sheet having lines and numbered spaces from 1 to 50, for the purpose of taking an entry of the total of each individual slip, and upon the conclusion of the day or the completion of the use of the slips, he figures his total and it becomes a record that enters into the entire record constituting an audit of the transactions of the day.

The COURT. Totaled up by the salesmen?

A. It is totaled by the salesmen and returned first to the proper office and in an organized institution becomes a part of the records of the business.

Q. These sales slips in the book are removable?

A. Yes.

Q. This index in the book is returned at the close of the day to the cashier?

A. Yes, that is the proper practice.

Q. And that is the chief record to check the sales record?

A. Yes, it is the means of carrying on the check of the individual sales to the complete recapitulation.

Q. It also checks up the sales slips, does it not?

A. Yes.

Q. Your report, I believe, does not include these indexes?

A. No.

Q. There were none such furnished you?

A. No.

Q. I believe you also stated you did not have furnished you any of the original adding machine totals or cash register totals of these sales slips by which they could be checkèd up?

A. No.

Q. You did not *compare each separate sales slip?*

A. There is *nothing to compare it with.*

Q. That is what I thought.

A. *What could there be that they could be compared with, unless there was a complete record of the individual sales?*

Q. *There is no complete record is there?*

A. *No, there is none."*

Thus Herrick could not check up the individual sales, not even with the cash book; nor do each day's totals agree accurately nor the finals either. This will be seen by referring to page 246 of the transcript:

(c) **Spurious sales slips included in Herrick's "report".**

It is quite evident that the spurious sales slips detected by Klink, Bean & Co. were not noted by Herrick and were included in the total amount given by him, or else being noted were included upon Isaacs' assurance by word of mouth that they were bona fide; hence Herrick's purported sales slips total of \$17,771.59 is padded to the extent of these spurious slips, if not more, and is short the amount of the missing sales slips which were not furnished him; and which Mr. Seynei and Isaacs himself both testified to the Court were missing (i. e., often not made out at all in the rush hours, and by Isaacs' evidence that "the *sales slips*

are short")) and which are proved missing by the computation of Klink, Bean & Co.

Further, it is also evident that his segregation under various days and dates of the hundred or more *undated* sales slips was purely arbitrary—or else based upon "*information afforded us by Mr. D. Isaacs*," that those particular articles were sold several years previous on that particular day and date.

It must be remembered that Mr. Herrick was *not requested* by his employer to compute the *number of articles on the slips* and compare them with the difference in the inventories, whereby he would have quickly discovered if any slips were missing. From Klink, Bean & Co.'s examination of the selection of sales slips produced in Court, it shows that many articles are missing, as for example—forty-nine (49) suits are missing; one hundred and fifty-eight (158) pairs of pants are missing; also hats, underwear, etc., and it is the purpose of this equity suit to ascertain not only how many sales slips are missing, but also the depreciation and authenticity of those produced; for the evidence of seven witnesses was to the effect that the cash sales were greatly in excess of the amount represented by this trustee to have been taken in by him for the complainants.

(d) Herrick fails to establish the integrity of the "cash book".

Now, taking up this trustee's so-called "cash book," the indefatigable Mr. Herrick assures us that it

“appears,”¹²⁵ correct in the same breath that he assures us, that he had no way of determining if it represents all the cash taken in, and that inasmuch as it was not a record of the cash not put in the cash drawer and of the cash taken out of the cash drawer during the day, it was “not a complete record.” He stated he did not know how much of the complainants’ money was not put in the drawer (evidently Isaacs did not confide this to him “by word of mouth”) but hastens to glibly add that \$1,654 was taken out.¹²⁶ Herrick testifies this “cash book” *was not a record of the individual sales*,¹²⁷ and that the entries were made in pencil and that he “presumes” they were thus made at the time of the sale. It is not only the complainants’ “presumption” but their affirmation, that these entries were entered and altered to meet the selection of sales slips offered the Court, as is Isaacs’ custom. To assure us from such a maze of “purports,” “presumes,” and “appears,” and “corrects unless they are false” that the cash book entries correspond with the sales slips is like assuring us that the pot is as *white* as the kettle.

This witness, Herrick, speaks truest when he admits the so-called “cash book” is not properly a cash book at all,

“This book is mixed up with a whole lot of other accounts.”¹²⁸ It is simply an ordinary book that exhibits a simple, primitive, crude record of sales, and of disbursements, and of nothing else. It is

(125) Tr. p. 131.

(126) Tr. p. 241.

(127) Tr. pp. 132-136

(128) Tr. p. 137.

*pencil writing.*¹²⁹ *The record is a very abominable accounting.*¹³⁰

and not a proper book of account for a trustee to keep towards his beneficiary of the trust fund. All of which of course is indefensible and inexcusable with regard to any trustee, but particularly so in the case of the well known keenness and clever business methods of this defendant and his jugglery of figures in business transactions over a long period of years. With such cool-headed, calculating type of man there is no such thing as "a hurry up proposition," as is best shown by the elaborate books of account, in evidence, ordered by this trustee to be kept in his own personal firm's handling of the balance of the trust fund after the clandestine sale in bulk to himself.

(e) Herrick's inferences beyond the facts.

Herrick's "report" consists mostly of five so-called "statements," which are all opinions based purely upon the "assumption of the integrity of the data furnished us," or "upon information afforded us by Mr. D. Isaacs," and that "unless they are false, they are correct." At no time at vital points are the assumptions of this accountant based on facts, or upon any record at the trial save the self-serving selected data furnished him weeks before the trial "by Mr. D. Isaacs." *Nowhere or at any time is there a single premise or assumption or declaration based upon the whole record in the cause.*

(129) Tr. p. 134.

(130) Tr. p. 141.

“Statement A,” being an assumption of receipts and disbursements exhibits the total sales of \$17,807.92 which is only correct “upon the basis upon which it is prepared,” and “upon the basis of the accuracy and integrity of the entries (“cash book”) of daily sales showing *therein*.”¹³¹ This witness says the vouchers “appear” to represent actual payments, but it will be observed the amounts do not correspond, and many including the labor items are missing outright as testified to by him. The “vouchers” are all copies and unverified, and the absence of the originals unaccounted for, and the depositions of those by whom they are purported to have been made were not taken or sought by this defendant. The rent voucher itself¹³² directly shows a debit against the defendant of \$920, as it states that the rent “was paid by the adjusters.”

Says this loyal witness—“These payments (labor items) are stated to have been made in coin”¹³³ (again the indefatigable “Mr. D. Isaacs”). Is it not equally as probable that such small amounts of expense as “\$6.50,” “\$4.75,” “\$10.00,” “\$28.09,” “\$30.00,”¹³⁴ etc., set forth in the “cash book” were also paid “in coin” out of the drawer!

In “Statement” B, recapitulation of sales as per cash book, etc., the witness again enthusiastically reaches the opinion, that “based upon the assumption that all the sales slips have been presented to us”¹³⁵ and

(131) Tr. p. 241.

(132) Tr. p. 133.

(133) Tr. p. 241.

(134) Tr. p. 250.

(135) Tr. p. 242.

“the indications of these entries (“cash book”), unless they are false,”¹³⁶ they approximately correspond. Here again it is interesting to note, that *although the daily totals do not correspond in one single instance yet the aggregate amounts apparently do;*¹³⁷ the little discrepancy of \$8.01 being a mere bagatelle, as it would have been too letter proof to have had such a “crude record” exact.

It is also interesting to note that the loyal and ingenuous Herrick was able to segregate the *undated* sales slips and arrange them capriciously under various daily dates, and thus, with a waive of the hand, *arbitrarily created* daily totals corresponding approximately to the cash book entries!

This accountant was quite correct when he testified that both the sale slips and the “cash book” were incomplete records inasmuch as there is no way of determining if either represents the actual amount of all the cash taken in.

“Statement” C—“based upon information received,”¹³⁸—how, or when, or where we know not, but it does not require Gargantuan wit to suspect the ubiquitous “Mr. D. Isaacs”.

This statement (representing the purported “settlement” between the insurance companies and their trustee) is prepared upon the basis of the accuracy of Isaacs’ purported retail sales and shows an “*appar-*

(136) Tr. p. 137.

(137) Tr. p. 246.

(138) Tr. p. 247.

ent overpayment¹³⁹ by this honest salvage man to the complainants of \$1.87; and exhibits this loyal accountant and his employer in a characteristically generous mood and sportive exercise of the imagination, seemingly delighting in the incongruous, the ludicrous and the droll, for there are no papers or records anywhere nor does Isaacs' original statement show that the retail sales were segregated from the sale in bulk, or that the "settlement" was made with any knowledge on the part of these companies, that any part of their stock had been lumped off in bulk at wholesale. Yet this loyal accountant (this brave Warwick), in his excess of zeal has not only segregated the retail and bulk sales in his "settlement"—but even "*Sold to H. C. Seynei & Co.*" the complainants' merchandise in bulk, as follows (upon page 247 of the transcript):

"Net Receipts, Sept. 6-27, as per Statement A	\$13,834.32
Balance of Stock, Sold to H. C. Seynei & Co., Sept. 30, as per Memo. Received	11,094.00
Total Net Proceeds	\$24,928.32
Less Commission to D. Isaacs, as per Memo. Received	5,780.38
Sales, Sept. 6-27	\$17,807.92
H. C. Seynei & Co.	11,094.00
20% of	\$28,901.92
Net Proceeds	\$19,147.94"

Could clearer proof be brought forward of the utter inaccuracy and bias of this so-called "Report"?

The trial Court evidently based its decision on the above statement rather than the whole evidence in the cause.

“Statement” D, purporting to show deposits in the Seattle National Bank is worthless for any purpose, as the data upon which it is based was excluded by the Court,¹⁴⁰ and there is no foundation for it upon the record. It was based upon purported “deposit slips” admittedly not the originals, and the deposition of the bank for the originals or certified copies thereof was not sought by the defendant; the deposit slip copies produced having been made up to suit his convenience.

The statement also exemplifies in the highest degree the bald jugglery of figures and misrepresentation to the Court by this trustee, in that it sets forth Isaacs’ claim of only \$19,744 deposits, whereas the evidence of the Seattle National Bank by its auditor shows \$20,744. The “statement” is also based on Isaacs’ production of only four checks sent him from his business at North Yakima, Wash., in the sum of \$2850,¹⁴¹ whereas his manager there, Mrs. Benzion, his wife’s sister, testified she sent to him in Seattle some \$7000 in checks during the period.¹⁴²

Centuries ago our criticism was coined for us—

“Falsus in uno, falsus in omnibus.”

(140) Tr. p. 157.

(141) Tr. p. 156.

(142) Tr. p. 166.

“Statement” E is based *exclusively* upon matters and information *de hors* the record “afforded to us by Mr. D. Isaacs.”¹⁴³

It rests entirely upon the conversation with his employer in which he claimed that of the total expenditure of \$3973, a part or \$2192.70 was made by check.

In view of the admitted fact that Isaacs did not show or offer upon the trial his checks, or check stubs, or bank books, claiming not to have them, thus depriving the witness and the Court of any way of determining what expenses actually were paid by checks, if any, the presumption is against this trustee, and the *cestui que trust* claim these expenses were all paid out of the cash drawer; and as the evidence shows that “cash book” entries do not include the monies taken out of the cash drawer, therefore the purported total amount of \$17,779.60 sales entered therein is short.

This “statement” discloses that through adept manipulation of figures Isaacs’ bank deposits show an apparent excess of \$915 over the amount available for deposit.

His accountant only accounts for this again by one of those mysterious conversations with his employer, who placidly explained that he must have deposited money from other sources! Herrick’s purported “Report” thus naively concludes—

“Mr. Isaacs informs us that without specific recollection it is probable that deposits were made by him within these stated total deposits in the period of moneys received by him from other

sources. The information afforded by this Statement E is not definite or conclusive but it is indicated that the total excess of the deposits over the funds available for deposit from the sale in the sum of \$915.54 is subject to a reasonable explanation and in any event is not of a relatively large amount.”¹⁴⁴

I have already shown (pp. 103-4) why Isaacs’ recollection of his “other deposits” was so poor.

It is doubtful whether this expert accountant (who it will be remembered was only employed by Isaacs after his first choice, Mr. Dolge, a highly esteemed accountant of San Francisco, had produced a “Report” which was highly disadvantageous to his employer), were being filched of \$915 he would so calmly say it “is subject to a reasonable explanation and in any event is not of a relatively large amount”.

We say, with all due respect to the honored Justice from Spokane who presided at the trial, that evidently the District Court, not to be outdone by this *largesse* on Herrick’s part, confirms him in it by accepting and receiving in evidence a “report” of no “relatively large” importance, being, as Herrick himself admits, an opinion not based on facts but depending in the last analysis on self-serving explanations “by Mr. D. Isaacs” *de hors* the record and made *ex parte* weeks before the trial.

Not only have misrepresentations been made to the Court and evidence withheld from it, but the evidence has been withheld from this trustee’s own witness,

this accountant, whose "Report" without it makes one think of Alice in Wonderland.

This whole "purported" report is a most disingeniously imaginative composition as bearing upon this trustee's jugglery of figures and even upon his honesty and probity; a written-to-order display of wordy and bombastic legerdemain with wrong conclusions based upon false and incomplete premises. It reminds one of the story of the man talking of the kettle, which was broken when he received it, cracked when he loaned it and whole when it was returned.

The defendant's whole case rests upon this absurd concoction, grotesque by all the principles and rules of evidence and equity, and its reception in evidence and adoption by the District Court as a whitewash of this trustee, was absurd and gross error and a repudiation of all the fundamental principles of evidence (Assignments of Error XXXIII, Tr. p. 192; XXXIV, Tr. p. 204; XXXVII, Tr. p. 207).

CONCLUSION.

In conclusion, first with reference to this "purported" report based in the last analysis upon Isaacs' verbal statements out of Court, these complainants call to the Court's attention that their affirmations and statements are all based on *facts in evidence* and the established presumptions of equity against one in a fiduciary capacity as this trustee, having exclusive and sole possession of the trust fund and handling it

admittedly to his personal profit, and upon the testimony of numerous witnesses not parties to the cause, uncontradicted and unimpeached.

Thus they have proven decisively the bald dishonesty and machinations of this trustee in fraudulently and sedulously concealing the correct total of his cash sales for these companies, and his misrepresentations to them through his statement that their merchandise was sold by him at an average of 20% *below* their original Bridge inventory cost price, whereas the record overwhelmingly exposes their property was disposed of for some 20% *above* the original Bridge cost price of the first inventory; a difference of 40%, a personal profit thus misappropriated from them by their trustee.

Isaacs' unhappy showing in reply made through selected data and non-production of bank books, check stubs, original checks claimed paid out for expense items; of original vouchers; of cash register totals, adding machine totals, and salesmen's indexes by which alone the number of sales slips missing from the gratuitous selection offered the Court and their amount could be ascertained, and his admissions as to their shortages, have been fully indicated at length to the Court within these pages; together with the glaringly sophisticated and improper book of account, the so-called "cash book" by this trustee of the proceeds of the trust fund. These phases of the cause therefore are submitted to the Court for its decision with the respectful insistence that in no wise has this trustee shown an honest and candid desire to reveal

the facts of his manipulation of this trust fund, but has in fact attempted to obstruct the Court in its determination, by withholding from it the only proof by which alone the correctness of the self-serving data furnished it could be determined; and whenever one withholds evidence, it is presumed it would have been against him if produced.

“When one willfully suppresses testimony, the presumption is, that such testimony, if produced, would be adverse to him.”

People v. Hurley, 57 Cal. 146.

The Remedy.

He should be charged as trustee with the value of the trust fund as given in the first inventory.

The view of your complainants is, that this defendant as their trustee has made an utter failure of his attempted accounting upon this trial, and should be therefore charged with the amount of the trust fund turned over to him as shown by the first inventory in exact figures in the sum of \$45,954, and interest thereon.

Decision by Judge Van Fleet in a similar case.

In this view they respectfully cite to your Honors as a precedent in this jurisdiction the unreported opinion of Judge Wm. C. Van Fleet in deciding a similar case—

Seynei v. Isaacs, In Equity, No. 83, U. S. District Court, Northern District of California, February 9th, 1916,

in which this same trustee was defendant, and which related to a portion of the same trust fund involved

in the cause at bar, that action having been instituted by his partner, Mr. Seynei, to enforce a similar accounting.

“The result of this hearing has left the Court without any doubt of its duty in the premises. I very frankly say that so far as my conclusion is concerned I think if the truth could be fully developed it would be shown to be very favorable to this plaintiff. Unfortunately the showing made here is such as to give the Court no tangible, no perfect basis upon which to ascertain the amount in exact figures that the defendant has realized from this property. I have indicated perhaps sufficiently during the hearing without repeating it the vice that exists in many respects in the showing made by this defendant. The testimony in behalf of defendant here of a contradictory—and I might add a more sinister—character is such as not only largely to destroy the value of the evidence of the defendant himself but of several of his witnesses. I am not at all satisfied in my mind that these purported books of account that have been put in before the Master and again on this hearing have not been sophisticated from start to finish. I have the evidence before me of the defendant himself that one book “Exhibit D” that he relied upon as an exhibit before the Master as a book made in the due and ordinary course of the transactions as they occurred was purely manufactured—made up for the occasion—after the suit was commenced and in the face of the litiga-

tion itself. So that I really have no safe basis upon which to rest my judgment in determining the values with which the defendant should be charged growing out of these books in any way. Under the law the defendant was occupying a fiduciary relation toward his partner. He had this property in his possession; he was bound to account for it; he was bound to account for it in accordance with just, reasonable and honest methods. That is all he was called upon to do, but he was required to do that, and he has not done it.

“There is one tangible piece of evidence here upon which the mind of the Court can seize as approximating, taking all the circumstances into consideration, what was doubtless regarded to be about the value of this property at the time it was boxed up for shipment to San Francisco, or at least to the warehouse, namely, the inventory made by the parties at Seattle. The evidence satisfies me perfectly that that inventory was made by the two partners jointly; that it represented their joint ideas as to what the value of that property then was. Counsel for defendant says that that was merely put down as the original cost price of the property; I do not think the evidence sustains that view. That inventory, very doubtless under all the evidence here, was made at a time prior to any conception in the mind of the defendant of the idea of trying to appropriate this property and claiming that he was the sole pro-

prietor of it and that he would account to no one for it. I think the Court is entitled to look to that inventory as representing more nearly the judgment of these parties to this litigation as to what the value of that property was than any other source furnished by the evidence. I am going to take that inventory and find it as the proper basis upon which the defendant is called upon to account here, just as I suggested yesterday to counsel I should do unless my mind was satisfied by the evidence as to the transactions here that that would not be just. As I indicated heretofore I think it is more than just. I am strongly inclined to believe under the evidence, not only of the witnesses who were connected with this business themselves, the salesmen and Mr. Sidder, and the deductions made by the expert accountant from these books as well, that if anything, I am, in taking this inventory as the basis doing an injustice to the plaintiff rather than the defendant; but it is the only tangible basis I have upon which to require this accounting. It will be made upon that basis and it will include this entire lot of goods and will therefore leave out of account the fag end that is still in the hands of the defendant. That inventory then with the values there stated will be taken as the basis of value upon which the defendant will be called upon to account."

IV.

THE SALE IN BULK.**Preliminary.****The Opinion in the Lower Court.**

I am strongly of the opinion that the enunciation by the District Court of the rule governing a principal's right of repudiation of an agent's sale to himself for the principal is erroneous and that it fails most signally to state the principal's absolute rights in the premises.

The District Court has in effect held that the agent's failure to inform the principal of facts known, or which ought to have been known to the agent, does not give the principal the absolute right of repudiation.

This seems to me a most radical departure from a long recognized rule. It establishes exceptions which have never heretofore been recognized. It lets down barriers by which principals and beneficiaries have always been protected from their agents and trustees and if it remains as the utterance of this Court, great mischief and hardship are, in my opinion, likely to occur in a multitude of everyday transactions, especially in the insurance world, between persons occupying confidential relations.

Insurance companies are peculiarly at the mercy of corrupt salvage men, who, where they find a weak adjuster, conspire to rob the companies of thousands of dollars. The chief protector of the companies is such an action for an accounting as the cause at bar. If the law as interpreted by the District Court in this

instance is to stand, it lets down the bars and gives free rein in the future to all kinds of combinations between salvage men and adjusters—for the salvage man such as this defendant need only say “I told the adjuster everything”, to estop the companies from ever seeking redress in the Courts against such thievery.

I am confident that the true rule will be found to allow no exceptions, that is to say, that a principal has an unqualified right at his own option to set aside any sale made for him by his agent to himself, upon discovery of any, even slight, failure of the agent to disclose pertinent information which might have influenced the principal’s conduct. Equity has always been keen to scrutinize dealings between parties in the relation in question, and has uniformly adopted the unrestricted rule in favor of setting aside such sales, which rule, I respectfully submit, has been practically overturned by the District Court’s opinion.

There are, of course, hosts of authorities both English and American on the question, and I take the liberty of quoting a few verbatim not to cite principles of law to your Honors but for the clarity and directness of reason of these individual citations as closely administering the cause at bar.

In *Tate v. Williamson*, L. R. 1 Eq. 528, 536 (1866), affirmed by the Lord Chancellor in *Tate v. Williamson*, 2 L. R. Ch. App. Cas. 55, a circumstance somewhat similar to the concealment of the depreciation of the second inventory in the cause at bar existed. The agent offered a certain sum for his principal’s property. The next day the principal accepted the offer. Before

an agreement had been signed, the agent obtained a valuation by a mining surveyor, and the sale was completed without this valuation having been communicated to the principal (syllabus, *Tate v. Williamson*, 2 L. R. Ch. App. Cas. 55).

In holding that this concealment necessarily entitled the principal to a judgment of rescission irrespective of whether or not an adequate consideration was paid and irrespective of the fact that all other circumstances of the transaction were fair, the Vice-Chancellor (*Tate v. Williamson*, L. R. 1 Eq. 528, 536 (1866)) said:

“The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed, to exert influence over the person trusting him, *the Court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him.*

“The young man having then said that he was determined to dispose of his property, *it was absolutely impossible for Robert Williamson, filling as he did that position of confidential adviser, to enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to its value*” (page 537).

The Vice-Chancellor held that the suppression “*renders it impossible for the Court to sustain the purchase*” (syllabus).

The case was appealed to the Court of Appeals in Chancery (*Tate v. Williamson*, 2 L. R. Ch. App. Cas.

55, 65) and in affirming the judgment, the Lord Chancellor said:

“Having stated my opinion with regard to the duty cast upon the defendant to communicate Cope’s valuation to the intestate, it seems unnecessary to pursue the case further. The fair dealing, in other respects, of the defendant during the negotiation, and before the agreement was signed, becomes almost irrelevant. The refusal of the solicitors to proceed with the agreement unless the young man had some legal assistance, the recommendation of the defendant that the intestate should apply to his father for advice, the opportunity afforded him pending the negotiation of consulting any friends who were capable of advising him, the reference to Mr. Payne, whether merely for the purpose of completing the agreement, or to afford the intestate an opportunity of obtaining his opinion as to the value, *all these considerations are of no consequence, when once it is established that there was a concealment of a material fact, which the defendant was bound to disclose.*

“Nor, after this, is it of any importance to ascertain the real value of the property.

“Even if the defendant could have shewn that the price which he gave was a fair one, this would not alter the case against him. The plaintiff, who seeks to set aside the sale, would have a right to say, ‘You had the means of forming a judgment of the value of the property in your possession, you were bound, by your duty to the person with whom you were dealing, to afford him the same opportunity which you had obtained of determining the sufficiency of the price which you offered; you have failed in that duty, and the sale cannot stand.’ ”

In *Rubidoux v. Parks*, 48 Cal. 215, the California Courts held that “the utmost good faith is required.” If there is not the utmost good faith the equitable requirement is not complied with.

Mr. Freeman in his note to *Richmond's Appeal* (21 Am. St. Rep. 101) states the rule as follows:

“Where a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every such transaction between them by which the superior party obtains a possible benefit, equity raises a presumption, and casts upon the party the burden of proof to show affirmatively his compliance with equitable requisites, *and of entire fairness on his part.*”

Surely in these cases the principal is entitled to be informed not only of all the facts within the actual knowledge of the agent, but also of all facts which the agent should inform himself concerning,—that is of all facts which ought to be known to the agent.

In *The Laws of England*, by the Earl of Halsbury (Vol. 1. Title “Agency”, Secs. 404 and 405, pg. 189), the learned author says:

“An agent will not be allowed to put his duty in conflict with his interest, and therefore he must not enter into any transaction likely to produce that result, unless he has first made to his principal the fullest disclosure of the exact nature of his interest, and the principal has assented. *An agent does not discharge his duty in this behalf merely by disclosing that he has an interest, or by making statements which might put the principal on inquiry.*

“In these and all other transactions with the principal, he (the agent) must disclose every material fact which is or ought to be known to him, if it were likely to operate upon the principal’s judgment. If this is not done the fairness of the

transaction is immaterial and it is voidable at the principal's option.

“An agent must not, without the knowledge of his principal acquire any profit or benefit from his agency other than that contemplated by the principal at the time of making the contract of agency. The rule applies in spite of the fact that the agent has done his best under the circumstances or incurred a possibility of loss, or that the principal has in fact received the benefit he himself contemplated from the transaction. All such profits and the value of such benefits must be paid over to the principal.”

And the rule is axiomatic as in the present cause that where a beneficiary seeks to set aside a sale upon an accounting he is not required to restore the money or other benefits he has received from his adversary, if, whatever might be the result of his action, he would be entitled to keep what he has retained. Cases of that nature arise where, as here, a party has been led by fraudulent contrivance to accept less money than was due him. They retain that and demand their trustee further turn over to them the amounts which this accounting shows due. This is best exemplified perhaps in the leading California case of *Watts v. White*, 13 Cal. 321. That was a suit between partners—plaintiff seeking to set aside a deed of his interest in partnership property procured by fraud of defendant, and to enforce an accounting. The Court said that plaintiff risked his case on the result of the accounting, and since he alleged that a greater sum was due him than he had received for the deed no offer to restore the consideration for the deed was necessary before suit. I may observe that in such a case the

money received by the plaintiff becomes part of the subject of the accounting; in any possible event he has an interest in it, and until the adjustment of the accounts is as much entitled to it as the defendant.

(A) THE FACTS

Complainants' bill contains the following:

"That said transfer to himself by their trustee was a gross fraud and imposition upon your complainants who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund together with his profits thereon additional in such sum as the Court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale."

To this end their proof upon the record discloses, in brief, the following salient facts relative to Isaacs as their trustee, viz:

1. *Misrepresentation;*
2. *Actual fraud;*
3. *Concealment;*
4. *Misappropriation;*
5. *Gross inadequacy of Consideration.*

In this regard your Honors' attention is respectfully called to our Assignments of Error VIII to XIX, inclusive (Tr. pp. 172-180, and XXVIII, XXIX (Tr. p. 186), and XXXI (Tr. p. 187).

After selling one-third ($\frac{1}{3}$) of the stock at a three weeks' retail sale to the public, Isaacs closed down that

retail sale for the purpose of transferring the balance of the stock secretly in bulk at wholesale to himself. The evidence overwhelmingly shows that such a thought was in his mind from the first.

(1) His Misrepresentation.

(a) There was no necessity of closing down the retail sale.

All the five salesmen and Mr. Bridge and Mr. Bailey testify to its having been most successful.

(b) The misrepresentation of the stock's value.

This trustee misrepresents the facts when he testifies the expenses on the complainants' retail sale were eating up the profits and he couldn't afford to continue the sale any longer;¹⁴⁵ for his own exhibit, the notorious purported "Cash Book" kept in lead pencil, shows he was still conducting the retail sale at a profit at the time he closed it down and that the sales were not appreciably diminishing.¹⁴⁶

The entries on page 68 show that the sales that third week were only \$300 less than the week before.¹⁴⁷

Also when he testifies the expenses were over \$200 a day,¹⁴⁸ his own exhibit, this same "Cash Book" flatly contradicts him and gives him the lie direct. It shows his expenses were not over \$125 for each working day. or \$750, for the entire third week, and this *includes* rent, light, advertising, labor, etc.

(145) Tr. p. 143.

(146) Tr. p. 246.

(147) Tr. p. 246.

(148) Tr. p. 143.

The Seynei books (Tr. p. 227) show that at the Seynei 42 days' sale, conducted under exactly the same conditions in the same store, the expenses were only \$75 per day.

Isaacs' "cash book" shows the total receipts for that third week were \$3739, or \$623 a day; thus the expenses were only $\frac{1}{5}$ or 20% of the receipts; *being less than what Isaacs himself testifies are the average expenses*,¹⁴⁹ and left a good profit.

To show that the actual net returns realized the third week of the complainants' retail sale averaged higher than their trustee's "bid" of 45%—I present the following three tables:

First. If these goods were marked and sold 20% above the original Bridge inventory cost as has been testified to, then this merchandise which was sold during that third week of the sale realized **NET**, after deducting 20% for expenses, the original Bridge inventory prices themselves.

Yet Isaacs closed down this sale in order to buy this merchandise which was then selling *net* at its original inventory cost prices, for himself for 45% of, or 55% *less than those same inventory prices; a loss to these complainants of 55%*. In spite of this, the trial Court held Isaacs only purchased the stock in order to prevent its being sacrificed!

Second. Even if this stock sold on an average at these inventory cost prices during that third week, it realized **NET 80%** of those prices, which was **35% HIGHER** than Isaacs' purchase price at 45% of those inventory cost prices.

Third. However, even if we assume the merchandise that third week sold 20% below its inventory cost price, as Isaacs' depreciated figures falsely indicate, **EVEN THEN IT REALIZED NET 60%** of those inventory prices during that third week, which was fifteen (15%) per cent **HIGHER** than Isaacs' purchase price of 45% of the same cost prices; and it must be remembered that Isaacs' "sacrifice" bid of 45% was not net; he further deducted 20% as commissions thus depreciating his bid of 45% still further; also Isaacs' bid in reality was 35% or less of those inventory cost prices and not 45% as represented by him.

In view of the above figures (and figures do not lie) and in view of the cash sales taken from the Seynei books showing that Isaacs after the retail sale for the complainants continued to sell this same merchandise for himself at a profit of 10% *above* the same Bridge inventory cost prices, can it be said their trustee honestly protected these complainants in closing down their retail sale? Certainly not, as these figures show he could have continued their sale right along at a profit to them. Nor can it be said he correctly represented the true value of that stock, when he testified he said the expenses were eating up the profits; that the expenses were over \$200 a day and the receipts were down to \$400 and "running down and down"?¹⁵⁰

(c) **The misrepresentation of its condition.**

Isaacs also misrepresented the facts when he said the stock was all run down and sizes broken up.¹⁵¹

(150) Tr. p. 143.

(151) Tr. p. 143.

Mr. Mason testifies the stock was a staple stock and could not be badly broken up if two-thirds of the entire stock remained after the retail sale; and that this remainder could not be “remnants”.¹⁵²

It is evident that if it only required a few hundred dollars worth of stock at the beginning of the Seynei sale to reinstate this “remnant”, it could not have been greatly reduced in quality or sizes.

The clothing was *one-half* ($\frac{1}{2}$) the entire stock¹⁵³ and it only required less than \$1000 to replenish it during the entire *seven* weeks of the Seynei sale; these new purchases were less than *one-sixteenth* ($\frac{1}{16}$) of the entire clothing even at Isaacs’ depreciated figures.

Mr. Jeremy testifies only fifty suits and a couple of dozen pants and some raincoats were purchased.¹⁵⁴

Can it be truthfully said the suits were greatly broken up if it only required fifty (50) to fill out the necessary sizes?

The same is true of the shoes and other lines, for in the beginning the Seynei books show only a small amount of shoes were purchased.

Mr. Mason testifies to the self-evident truth that if a broker contemplated buying the balance of a stock, he would, while selling for his principal, be tempted to save the best stock for himself.¹⁵⁵

(152) Tr. pp. 116-117

(153) Tr. p. 60.

(154) Tr. p. 78.

(155) Tr. p. 114.

That this trustee did so contemplate the purchase of this stock for himself in bulk while conducting the retail sale for these complainants is shown by the fact that soon after the retail sale started he formed a partnership agreement with Mr. Seynei¹⁵⁶ to handle this very stock in that very way.¹⁵⁷

(Judge Van Fleet in the Interlocutory Decree in *Seynei v. Isaacs*, Eq. 83 in the same Court, established the date of the forming of that partnership as September 10, 1913.) Isaacs began his retail sale for these complainants on September 6, 1913.

Mr. Seynei testified that Isaacs did actually lay away some of the best of the merchandise, some \$5000 in value.¹⁵⁸

The two salesmen, Messrs. Basher and Johnson, testify not over 10% of the entire stock was damaged.¹⁵⁹ If 90% of the entire stock was good and undamaged the proportion of damaged in the remaining two-thirds after the retail sale could not have been very great, nor greatly depreciated in value, for Mr. Meyer testifies even the damaged on the retail sale was marked *above the Bridge cost price*,¹⁶⁰ and Mr. Seynei¹⁶¹ and Mr. Jeremy¹⁶² testify the damage to the entire stock was not over \$500 or \$600.

(156) Tr. p. 53.

(157) Tr. p. 159.

(158) Tr. p. 54.

(159) Tr. pp. 87-88-90.

(160) Tr. p. 90.

(161) Tr. p. 45.

(162) Tr. p. 75.

Prima facie if this stock sold for 10% above its inventory Bridge cost, as the Seynei books show, it could not have been very much run down or “remnants”.

The representations of this trustee therefore were and are false when he represented the stock was all run down and the expenses were eating it up and the only reason he took it was because he expected to handle other salvage stock,¹⁶³ for his own books contradict him and he handled no other stock, and, as he testifies, had no other stock in view at the time he formed his partnership.¹⁶⁴

(d) The sale in bulk a frame-up and arranged beforehand.

Mr. Bridge testifies the sale in bulk “looked to him like a frame-up.”¹⁶⁵

Mr. Jeremy testifies there was no reason for closing down the retail sale, it was running along alright.¹⁶⁶

Mr. Bailey’s evidence corroborates Mr. Seynei and Mr. Jeremy and Mr. Bridge and shows plainly Isaacs had it all arranged beforehand to get control of the stock and had formed a partnership with Seynei for that purpose.¹⁶⁷

(163) Tr. p. 144.

(164) Tr. p. 159.

(165) Tr. p. 95.

(166) Tr. p. 77.

(167) Tr. pp. 101-102.

(e) The mute evidence of Isaacs' own books and handwriting.

Isaacs' own handwriting and figures on the Hotel Herald stationery¹⁶⁸ showing the value of the stock purchased in bulk as \$24,603.39 shows plainly the stock he bought in bulk was not "remnants" and all broken up and flatly contradicts his own oral statements and representations in the premises.

His partnership, the Seynei books do likewise, by charging the merchandise up to the partnership at \$24,600.00, and Mr. Seynei testifies Isaacs compelled him as the resident partner to do business on that basis,¹⁶⁹ and these books themselves corroborate him; as do also the actual profits made by the defendant's firm of Seynei & Co. on the transaction as shown by the books and their summary by Klink, Bean & Co.¹⁷⁰

All of which shows Isaacs directly misrepresented both the value and condition of the stock.

(2) Actual Fraud.

When agent violates trust he commits a fraud.

Agents are bound to exercise the utmost good faith towards their principals and cannot lawfully take secret interests in contracts which they are authorized to make; and when an agent is employed to sell he cannot lawfully become the purchaser, or if he is authorized to buy he cannot lawfully become the seller;

(168) Herein p. 166.

(169) Tr. p. 62.

(170) Tr. pp. 61-83.

and when he violates these rules he commits a fraud on his principals.

Smith v. Seattle L. S. & E. R. Co., 72 Hun. 202.

In addition to this direct misrepresentation by this trustee above set forth, I respectfully refer the Court to the following facts as shown by the record.

(a) While trustee for the complainants Isaacs schemed to transfer their trust fund secretly to himself.

He opened a sale for these companies on September 6, 1913, and on September 10th formed a secret partnership with H. C. Seynei, Bridge's manager, to handle for their mutual profit the balance of the stock as soon as they could get possession of it, and as Seynei testifies Isaacs conferred with him for the elimination of bidders at the sale in bulk.¹⁷¹

In accordance with this secret compact and after the sale on behalf of the complainants had only run nineteen days, Isaacs, their trustee, closed down the complainants' sale at retail to the public on a Saturday night, and placed the following advertisement in the Seattle Times, the next day, Sunday, in the want ad. column:

"The balance of the A. Bridge & Co. stock, 103-5 First Ave., Seattle, will be offered for bids Monday, Sept. 29, at 3 P. M. Coast Fire & Marine Insurance Co., D. Isaacs, Manager."

Such short notice would certainly not induce any competition, for it would not reach outside bidders.

If Isaacs had been sincere in his efforts to obtain competition in bidding he would have advertised while the retail sale was in progress (as Mr. Bridge says should have been done¹⁷²), or he would have telegraphed to bidders in larger markets such as Portland and San Francisco (as Mason says his rule was¹⁷³), and it is significant that Isaacs did neither. Mr. Mason testifies:

“Taking into consideration the fact that the defendant as the complainants’ broker was contemplating the purchase and buying in of the stock for himself, and did buy it in for himself, I do not consider such short notice fair to these complainants in obtaining the best possible price for their merchandise.”¹⁷⁴

Isaacs then consumed Sunday in taking a depreciated inventory of the balance remaining of complainants’ stock, claiming it to be \$24,653 at Bridge cost prices as a basis for his own percentage so-called “bid”, and on Monday morning, at eleven o’clock, instead of three o’clock in the afternoon, he walked out in the store and said glibly, “Well, boys, the stock’s sold to Harry Seynei”, and thus he sold to himself through a dummy, and later sent the statement set forth in the bill of complaint to the complainants showing no sale in bulk nor that he himself was the purchaser, and told his partner, Mr. Seynei, that he didn’t want the companies or Mr. Main to know he was the owner of the

(172) Tr. p. 95.

(173) Tr. p. 117.

(174) Tr. p. 114.

stock¹⁷⁵ and prepared advertisements and had them placed in the newspapers over the name "Harry Seynei", carefully omitting even the name "& Co." (Complts. Exs. 10, 12, 13, 14, 15).¹⁷⁶

All this, though at the time Isaacs was actually carrying on the same business (as shown by the little want ad. notice of the sale in bulk) under the fictitious name and style of "Coast Fire & Marine Insurance Co."!

As Mr. Bailey testifies:

"The defendant did not appear publicly as a bidder in his own behalf. The bid was made in the name of H. C. Seynei; and on the following Monday the sale was made in the name of H. C. Seynei as purchaser."¹⁷⁷

So not openly "*vi et armis*" did our trustee seize it; his trick and device being better described in the gentle raillery of the Latins—"molliter manus imposuit".

(b) The evidence shows there were no bona fide bids or bidders at the sale in bulk and that the sale was "fake".

Mr. Seynei testified he was in the store at all times during the insurance retail sale but did not see anyone examining the stock for the purpose of making a bid;¹⁷⁸ there was no time given for any such examination;¹⁷⁹ nor did he know of any one sending in bids;

(175) Tr. pp.54-58-69.

(176) Tr. pp.221-2-3-4.

(177) Tr. p. 101.

(178) Tr. p. 56.

(179) Tr. p. 65.

nor did he see any bids; nor did Isaacs open any bids; on these points he was most emphatic, and counsel's rapid-fire and disingenuous cross-examination could not confuse him—for instance:

“Mr. SCHLESSINGER. Now, there has been some suggestion made here—I say ‘suggestion’—that Mr. Isaacs bid in that stuff clandestinely. Were you present when those bids were opened?

A. What bids?

Q. The bids for the remnant stock, the tail end of the stock?

A. *There were no bids—*

Q. (intg.). Were you present when that sale occurred?

A. Yes.

Q. Were there any other persons present bidding on that stock?

A. There were three, if I remember, but they were not exactly bidding.

Q. Did any other persons file bids for that stock?

A. Those were not bids. * * *

Q. These goods having been purchased by Mr. Isaacs,—and by the way there was a bid put in there for that stock of goods, was there not?

A. Mr. Isaacs put in the bid.

Q. With your knowledge?

A. He told me how much to put in the bid for.

Q. It was put in in the name of Seynei & Co.?

A. No.

Q. In the name of Harry Seynei?

A. Correct. * * *

Q. Were you present when Mr. Isaacs' bid was opened?

A. Yes.

Q. Were you present when other bids were opened?

A. As I said awhile ago *I didn't know of any other bids.*

Q. Were you present when any other persons were present there offering to buy that stock?

A. There were three gentlemen there, as I recall.

Q. Were you present when there was a bid opened for \$10,000?

A. No."

Mr. Seynei specifically says that none of the men mentioned by Isaacs as having bid,¹⁸⁰ were bona fide bidders for this stock; and further, Isaacs asked him to speak to his friends so that they would not interfere and Isaacs could get the stock.¹⁸¹ Isaacs did not wait until three o'clock as advertised but the stock was sold in the *forenoon*.¹⁸²

Mr. Jeremy testified:

"He was present when the merchandise was sold in bulk; there were only three or four people there besides Isaacs and Mr. Seynei; that Isaacs came down from the balcony and announced the stock was sold to Harry Seynei; that was in the forenoon; 'I did not see him open any bids. I saw no bids. I saw no one looking around examining the stock.' Again on cross-examination he swears 'I did not see any bids for the tail end of that stock,'"¹⁸³

and defendant counsel's characteristic cross-examination was unable to shake him.

Mr. Bailey's testimony was that he was in the store at the time of the sale that Monday *morning* and heard two men complaining because they had not been given time to examine the stock, as they would like

(180) Tr. p. 65 .

(181) Tr. p. 55.

(182) Tr. p. 54.

(183) Tr. p. 79.

to have bid. He saw no bids. The time was too short for any prospective bidders to examine the stock.

“Mr. Seynei told me he had got the stock, but that he knew he would all the time.¹⁸⁴ I knew Mr. Seynei expected to get the goods but I did not know how they were going to do it. I remarked that it would be a pretty good joke if someone else had come in at that moment, when they had agreed upon their partnership, and bid in the goods, that is put in a bid over Seynei; and Seynei laughed and said that could not very well happen. Mr. Isaacs knew what to bid and gave it to him to put it.”¹⁸⁵

Mr. Bridge testifies:

“I had people myself who wanted to bid on that stock. When we came in, that was in the morning, the thing was all over; it was all over before noon. I came in with friends of mine who figured to put me in business. I had no chance at all. The whole thing looked to me like a frame-up because I was concerned in that stock as much as anybody and I absolutely had no chance; it looked to me like a frame-up proposition. I had the fixtures there, worth about \$5000, and I thought I had a chance to get back into business, for which there were people who wanted to stake me.”¹⁸⁶

(c) Isaacs lone tale.

There is an old French proverb which says:

“Whoever excuses himself, accuses himself.”

In view of all this great mass of testimony against him is it possible to give credence to Isaacs' lone tale, for Isaacs alone claims there were bona fide bidders.

(184) Tr. p. 102.

(185) Tr. p. 108.

(186) Tr. p. 95.

These "bidders", according to his own story, were however chosen by himself—to bid against him! And what were their names?

Karl Shermer, Abe Kessler, Morris Buttnick, Isadore Colsky, and Sam Cone, gentlemen whose very names smack of honesty and good intention, "friends of Mr. Isaacs",—a picturesque band under whose black flag the defendant himself tells us he shipped when he ran up the Jolly Roger and bore down on this gold laden merchandise galleon of the complainants.

Of these (according to Isaacs) Shermer bid 25% of value—of \$24,600; Sam Cone's bid was between 25% and 30%; Morris Buttnick's between 25% and 30%; Abe Kessler's was 30%; and Isadore Colsky's \$4200: But D. Isaacs generously bid \$11,094! Why? Ah, there's the rub; a rank outsider "butted in" and spoiled the game. Is it not true, if we are to accept the defendant's own story, that through the kindly aid of the gentlemen named, who were his friends, and through their honest conviction that the Bridge stock was but remnants and paltry trash, that our worthy trustee would have secured it for less even than he did pay, had it not been for one lone countryman, living way out at Bellingham, a dark horse in the race for this merchandise, Brenner by name, who came in but evidently *did not see* the merchandise concealed in the balcony which was not open to the public as has been testified to, and innocently bid \$10,000 "but only on condition he should get a lease on the premises". But Isaacs was there. He says he told Main he would protect the companies, and in his righteous

endeavor, not only prevented the presumptuous Brenner from "getting a lease on the premises", but took the lease himself, bid \$11,094, deducted his commissions of 20% on his own clandestine purchase, a paltry \$2218, and as protector proudly handed the companies as protectees \$8875 in actual cash for their goods which he himself had inventoried at wholesale cost at \$24,653. *O tempora! O mores!*

The above, of course, is the defendant's own story, which is flatly contradicted by Mr. Seynei, Mr. Jeremy, Mr. Bailey and Mr. Bridge. It is difficult to treat his contention even with politeness, but I draw the record on him here, not because his explanation of the smallness of his bid will have any weight with the Court, but because his efforts at escape border on the amusing.

(d) **Our trustee eliminates competition against himself as a "bidder".**

Isaacs instructed Mr. Seynei to arrange for the elimination of competition at the sale in bulk¹⁸⁷ and clearly violated his duty to the complainants—*especially so when at that very time he himself contemplated becoming the purchaser of the property, and the elimination of competition was solely to that end.* Under such circumstances it was his bounden duty to encourage in every manner possible any person who contemplated becoming a purchaser of the property. This was clearly a case where, as said by Mr. Pomeroy, post, "the agent united his personal and representative characters in the same transaction" and where

he was "exposed to the temptation or brought into a situation where his own personal interests conflicted with the interests of his principal and with the duties which he owed to his principal". The candor and disinterestedness referred to by Mr. Pomeroy were wholly wanting, and such acts on Isaacs' part characterize the transaction in question as unfair and lacking in the good faith which equity requires.

As said by *Mr. Mechem*, post, "a court of equity, upon grounds of public policy, will subject it (a transaction of this kind) to the severest scrutiny". Tested by this rule, the transaction would be voidable upon the ground alone of Isaacs' attitude in instructing Mr. Seynei to see that all real competition was "*eliminated*".

(e) The trial Court ignored Isaacs' elimination of competition and depreciation of the second inventory.

The opinion and decision in the trial court makes no reference to the elimination of competition and of bona fide bids or the depreciation of the second inventory by Isaacs, as explained in the following pages, seemingly in line with its astounding ruling upon the trial that

*"The objection to all evidence tending to show actual fraud will be sustained."*¹⁸⁸

It is respectfully urged that such attitude is unprecedented in an equity cause, and clearly constitutes error under Assignments XV, XVI, XVII, XVIII (Tr. pp. 175-179) and VIII (Tr. p. 172).

(188) Tr. p. 78.

Mr. D. Issacs,

103 First Ave. South,

Seattle, Washington.

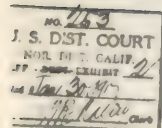
Dear Sir:

I hereby submit to you the following
bid of the A. Bridge stock: Forty-seven cents
(\$.47) on the dollar of the invoice price.

Hoping this meets with your approval.

I remain,

Yours truly,



(f) Our trustee drops his own "bid" 2% and cleans up \$492.

The evidence shows that Seynei never put in a bid nor offered a bid, but that Isaacs prepared one at 47% (the carbon copy of which is in evidence and reproduced herewith), which Seynei signed and when Isaacs found everything was going along swimmingly dropped it down to 45%, thus directly depriving these complainants of \$492 as they were entitled to the best price Isaacs could get for their property.

Mr. Seynei testifies, :

"He used my name on the sale, the bid being placed in my name. This is a copy of the bid (Plffs. Ex. 2); the defendant dictated that himself in my presence to the stenographer, and I gave it back to him after I signed it.

"The defendant's statement to the complainants that the highest bid was 45% of the cost was false; the highest bid was 47%; the fact is this bid in his hands was two per cent more. Although my name was used the defendant was the actual purchaser; he bought the stock. I did not have eleven thousand dollars to pay for this stock at that time.

"The defendant purchased these goods in bulk for himself from the complainants for \$8875 net, and then sold them to our partnership for \$11,094 and that amount was charged to our partnership on the books of H. C. Seynei & Co. afterwards opened; my books show that was the amount. The defendant thus made a personal profit of over two thousand dollars for himself."¹⁸⁹

(g) Isaacs in writing admits his purchase to be worth \$24,603.

That same (Monday) night Isaacs and Seynei sat down together at the Hotel Herald.

Mr. Seynei testifies as follows:

“The sale in bulk of this stock occurred on a Monday morning and on that evening I had a conversation with him at the Hotel Herald in Seattle. At that time and in that conversation I went over with him the amount of the merchandise which had been purchased for the firm business. These two sheets of paper (Plffs. Ex. 16) upon the Hotel Herald stationery, were made out by the defendant at that time in his own handwriting. They show in his own handwriting what the merchandise was worth, what was to be charged up to me, how much to account for: on the other side the departments are specified, the individual departments such as Clothing Department No. 1 to Department 8. These are all in his own handwriting. At the time he made out that paper he said to me the stock was actually worth the amount of money written on that paper; and he figured the stock to us was worth \$24,600; and that I should account to him for every dollar received for that stock.”

“The defendant spoke at the time of the profit, about \$13,000 he made on the transaction of the sale in bulk at that time and said he had made a successful purchase from the complainants; that there was no reason why I should not make a success of that stock; that I had the best of it, to his knowledge; and that the merchandise was actually worth the amount of the inventory—one hundred cents on the dollar.

“The defendant charged the partnership \$11,094 for that Bridge stock; and that sum was placed upon the books as a credit to him at that time, and the firm of H. C. Seynei & Co. was charged on the books with merchandise at the value of \$24,600. This merchandise was entirely original Bridge stock.¹⁹⁰

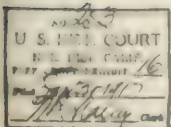
“With reference to these books of H. C. Seynei & Co. which are in evidence, the defendant directed

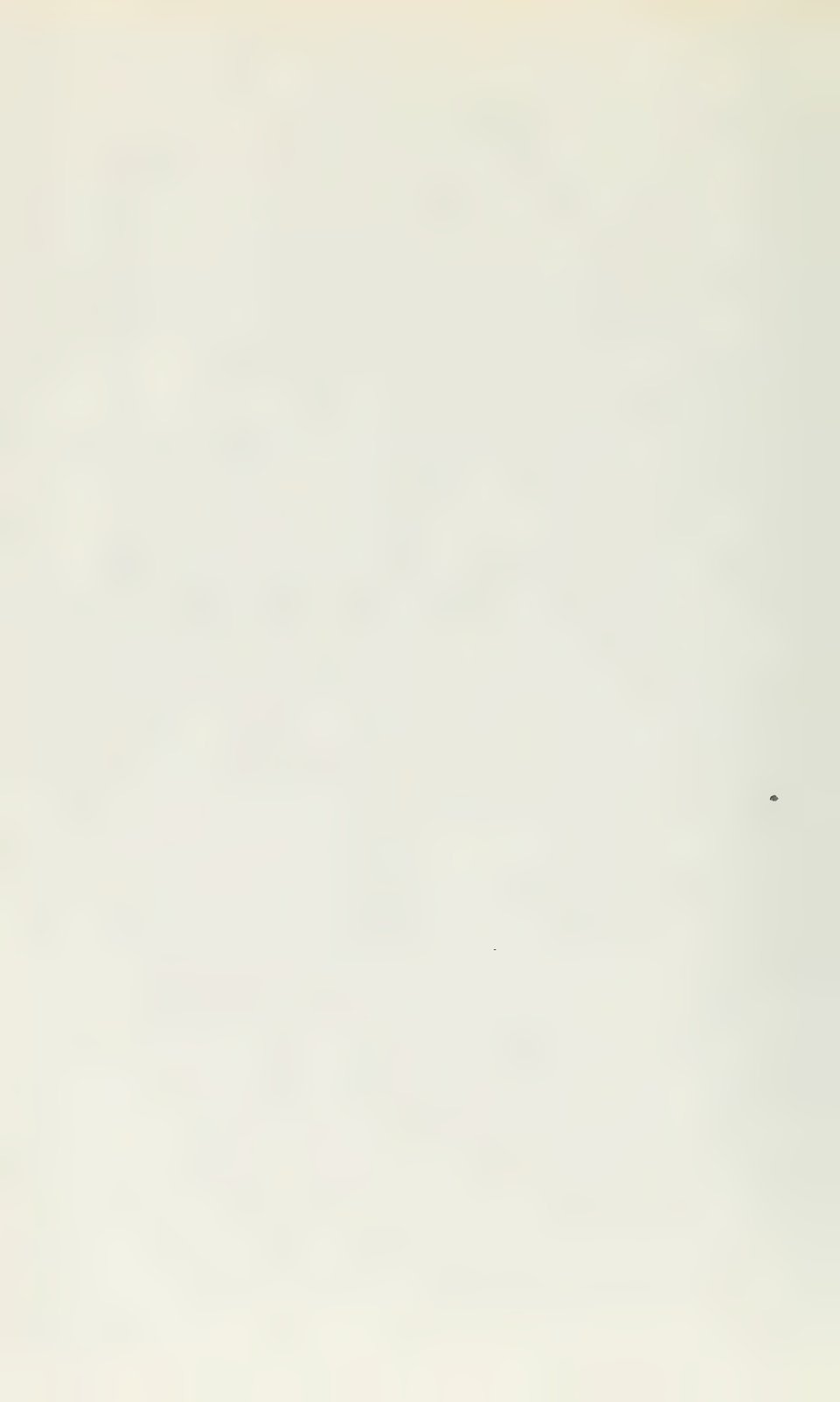
Hotel Herald

TERRY AVE. & MARION ST

Seattle

735. 7 shoes.	2166.80
173. Rubber Boots - Shoes	257.00
Leather - Fur - Coats - Hats	110.95
Best Coats. Corsets. Rubber	944.87
Machineries - all kinds	
Underwear. Dressing Trunks	3662.98
Men's Shirts. Gloves	1372.08
Hats & Caps - Hair Bands	5050
Vests & Aprons - all kinds	58.50
Trunks - Suit Cases	213.55
Collars - Cuffs -	11.892.00
1108. Suits	1307.50
157 Corsets	374.00
52 Corsets	89.00
4 Fur Coats -	2042.70
761. per Pair -	24,603.39





Hotel Herald

TERRY AVE. & MARION ST.

Cashmere Bookery Seattle

Tickets.	Clothes	1
Practen.	Shoes	2
Electric Lights	Hats - Suit Co	3.
Schneiderre -	Shirts	4.
	Underwear	5.
	Black & White	6.
	Cornalls	7.

Furniture	1 co	Thin Linen S. & L.
	1 "	Heavy Cotton Rib.
	1 "	Cashmere.
	1 "	Cotton.
	1 "	Heavy wool - Mad.
		Suspenders - 2 grades.
		Hkps.

Work Shirt. full in on Flannel & Heavy Shirt

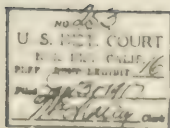
Neckwear -
Cornalls & Jumpers -
Work Shirts.

Union suits -

Blankets.

Hats -

Umbrellas -



their opening and was explicit as to how they should be kept in detail. It was at his direction that the merchandise sold in bulk to himself was debited in the ledger (Plffs. Ex. 7) at pages 4, 6, 8, 10, 12, 13, 14, 16, with the full amount of the inventory, \$24,600.”¹⁹¹

(h) Conceals his ownership under the name “Harry Seynei”.

Seynei testifies the partnership of H. C. Seynei & Co. was never known to the public, nor was it known that Isaacs had any interest in the stock, but the business was run and advertised under the name “Harry Seynei”; the newspaper advertisements beginning with the picture of Seynei and ending with statements over his name.

“The defendant’s interest in our partnership was never made known to the general public. It was at all times a secret sale; a secret partnership. This secrecy was compelled by the defendant. The reason he gave was that he did not care to have Mr. Main know anything about it, that he was the owner of that stock. So my name was used individually. The name of H. C. Seynei & Co. was never publicly used. I advertised in the public papers. These are the advertisements (Plffs. Exs. 11, 13, 14, 15).”¹⁹²

Nearly all these facts are corroborated by Mr. Bailey in various portions of his testimony, who, together with Mr. Seynei and Mr. Jeremy, flatly contradict all of this trustee’s self-serving declarations and statements as to his own honesty and good faith.

(191) Tr. p. 61.

(192) Tr. p. 61.

- (i) How our trustee depreciated the second inventory for his individual gain.

Isaacs' method of depreciating the inventory made by him for a low basis for his percentage bid upon his secret sale in bulk to himself, was fully explained by the witnesses H. C. Seynei and John Jeremy, who were present at its taking, and whose testimony is unequivocally corroborated by the testimony and exhibits of the witness, Mr. George T. Klink, of Klink, Bean & Co., certified public accountants.

Mr. Seynei testifies that

*"Isaacs said he would have to take an inventory and make a showing he was not the bidder for it, and to lump it off, and he would advance the money and buy it in my name".*¹⁹³

Isaacs then laid some of the best merchandise, some \$5000 in value, aside up in the balcony where the public could not see it.

*"and the remainder of the merchandise was tied up in bundles to make it look as discreditable as possible; that is to make them look as cheap as possible".*¹⁹⁴

And as to the further depreciation and method he testifies:

"Mr. OLNEY (referring to the second inventory, (Plffs. Ex. 4) Q. Is this that inventory?

A. Yes.

Mr. OLNEY. We offer the same.

The COURT. It will be admitted.

Mr. OLNEY. Q. Was that inventory taken at Bridge cost prices?

(193) Tr. p. 53.

(194) Tr. p. 54.

Mr. SEYNEL. A. It was taken the same as it was taken for the insurance sale, except that *Mr. Isaacs took some suits tied up in bundles, suits which cost as much as \$15 wholesale and mixed them in the \$9 pile, lumped them off, and made them \$9.50 or \$9.*

Q. Then it was not taken at Bridge cost prices?

A. I said a while ago he mixed them up.

Q. As I understand, then, for the purpose of this inventory, the higher priced goods were taken and wrapped up in bundles and tied up and marked at a very much lower price?

A. It was mixed up with the cheaper stuff; so many suits at \$9 mixed with the higher priced stuff.

Q. So that that depreciated the inventory so much?

A. Yes, the clothing was depreciated very much.

Q. How much did that depreciation run?

Mr. SCHLESSINGER. We object to that as immaterial, irrelevant and incompetent.

The COURT. He may answer subject to the objection.

A. It was considerable.

Q. About how much? You must know?

A. The inventory plainly shows the amount of suits taken at \$9.50 for the insurance companies after the three weeks successful sale, and the amount of suits taken after the sale—the fire sale at \$9.50, left in the remainder of the stock shows *there must have been at least \$3000 or \$4000, maybe more, maybe \$5000, mixed up—that is the higher prices mixed up with the cheaper, and he reduced it by keeping them tied up in the cheaper merchandise.*

The COURT. \$4000, or \$5000, in all?

A. Yes; that means in the lower cost.

Mr. OLNEY. He had the price lowered in that way?

Mr. SCHLESSINGER. I object to that as immaterial, irrelevant and incompetent.

The COURT. I will admit it subject to the objection.

A. Mr. Isaacs himself dictated the inventory; he took the figures down.

Q. What did Mr. Isaacs say to you in reference to the depreciation of this inventory?

A. He naturally wanted it to look as low as possible.

The COURT. The question is what did he say if anything?

A. *Mr. Isaacs said he did not want Mr. Main to know how much stock there was left on the premises.*

Mr. OLNEY. What was the purpose of taking that inventory?

Mr. SCHLESSINGER. I object to that as calling for the conclusion of the witness and immaterial.

The COURT. I sustain the objection unless he knows.

Mr. OLNEY. He was a partner of Mr. Isaacs.

A. *The purpose of taking it was for him and me to become partners in the business.*

Q. I want you to state, Mr. Seynei, the conversation that you had with him, and what he said to you.

A. *He wanted to show his bid was highest, and make it look as though he bid as much as the stock was worth.*

Q. Have you stated all the conversation that you had with Mr. Isaacs in reference to depreciation of this inventory, and statements by him as to why he depreciated the inventory?

A. I think I have answered plain enough that he wanted the stock for himself, and had depreciated it as much as possible so he would not have to account for it.

Q. He said that to you?

A. Yes. I think I made it plain enough a while ago."¹⁹⁵

Mr. SEYNEI (continuing). “This second inventory (Plffs. EX. 4) was made for the purpose of the sale in bulk.

After the sale in bulk by the defendant to himself these prices which had been so depreciated and lowered were raised and the merchandise sold for more money than it was taken in the depreciated inventory for.”¹⁹⁶

And the substance of Mr. Jeremy’s evidence is practically the same,—that the merchandise was made to look as cheap as possible by Isaacs’ directions; that the goods were all stacked up in piles, lumped up, and the tables moved all around to make it look as rough as they could.¹⁹⁷

Seynei said that \$24,653 did not represent the true and correct cost of the merchandise, and that the inventory therefore *was not* taken at Bridge cost prices.¹⁹⁸

The foregoing evidence alone should be sufficient to prove defendant’s sinister methods in obtaining the stock without competition and far below its market value, but the actual data in evidence, the first and second inventories, corroborate this evidence and plainly exemplify it.

- (j) The mute evidence of the inventories themselves prove this depreciation and corroborate Mr. Seynei and Mr. Jeremy.

This second inventory itself corroborates this testimony that the complainants’ merchandise was entered therein *in lots* and was not taken piece by piece, as in

(196) Tr. p. 59.

(197) Tr. p. 78.

(198) Tr. pp. 56-57.

the first inventory taken immediately after the fire and which first inventory stands undisputed as being fairly taken at Bridge cost prices and included all the merchandise on the premises.

The difference of time consumed in the taking of these two inventories is also significant, two weeks were occupied in the taking of the first,¹⁹⁹ while the second inventory was taken in a day.²⁰⁰

Mr. Klink's report, complainants' exhibit 19, reproduced herewith, unanswerably confirms Seynei's and Jeremy's testimony that prices were depreciated, i. e., *lowered*, in this second inventory.

(k) Explanation of complainants' exhibit 19, report of Klink, Bean & Co.²⁰¹

It is a smiling commentary upon the utter inconsistency of the opinion and decision in the court below that the learned judge of the trial court failed utterly to grasp the significance of this exhibit. Assignment of Error XVI (Tr. p. 175).

This exhibit (as testified to by Mr. Klink)²⁰² reproduced here comparing departments of merchandise in the first inventory with similar departments in this second inventory exposes the fact that after conducting a three weeks' sale *there were more articles of a similar kind at a given price in the second inventory than in the first; for the stock remained the same without the addition of new goods.*

(199) Tr. p. 48.

(200) Tr. pp. 56-78.

(201) Herein p. opposite.

(202) Tr. pp. 80-81.

A BRIDGE & COMPANY

SEATTLE

COMPARISON OF INVENTORY NO. 1 AND INVENTORY NO. 2 SHOWING THE CLASSES AND AMOUNT OF GOODS IN WHICH THE SECOND INVENTORY EXCEEDED THE FIRST

Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total	Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Men's Suits	6 50	4	5	1		Knacknaws	2 25	2	21	19	
	6 75	-	1	1			4 10	16	20	4	23
	9 50	191	195	4							
	10 50	38	96	58		Oil Coats	1 15	-	2	2	
	13 50	41	85	44			1 80	-	2	2	
	14 50	21	46	25			2 00	-	3	3	
	15 50	-	1	1			2 80	-	3	3	
	16 50	1	15	14			3 00	-	1	1	
	17 00	4	6	2			4 00	1	2	1	14
	20 00	4	5	1	155						
Men's Pants	1 00	16	45	29		Sweaters	1 95	-	41	41	
	2 50	152	354	202			2 00	3	16	12	
	3 25	37	71	34			2 35	9	19	41	
	3 55	-	35	35	301		2 65	2	49	47	
							3 60	1	6	1	
Shoes	75	-	2	2			4 00	1	2	1	
	2 25	19	34	15			4 05	5	5	2	
	2 50	21	87	66			4 10	5	22	17	
	2 60	15	28	13			4 35	1	3	2	163
	3 40	21	34	13							
	4 10	2	5	3							
	5 00	20	43	23							
	5 25	-	3	3							
	5 55		4	4	142						
Hats and Caps	1 75		90	90							
	50		48	48							
	75		54	34							
	1 00	2	3	1							
	1 05	8	39	31							
	1 25	42	65	23							
	1 40		22	22							
	1 85	25	36	11							
	3 50	3	15	12							
(Hats) Dos.	2 00		147	147							
" "	3 50		36	36							
" "	6 00		8	8							
" "	7 50		28	28							
" "	9 00		48	48	539						
Overcoats and Cravenettes	4 75	3	15	12							
	5 25	-	2	2							
	5 75	-	17	17							
	6 50	26	44	18							
	9 00	40	41	1							
	9 50	2	21	19							
	10 00	3	4	1							
	10 50	8	23	15							
	13 00	5	7	2							
	15 75		2	2	89						
Boys' Suits	None in Excess in		Inv. #2								
Rubbers, Boots, Sandals, etc.	55	9	11	2							
	2 20	10	12	2							
	2 25	3	43	40							
	2 75		6	6							
	2 95		9	9							
	3 85		1	1							
	4 35		3	3							
	4 95		11	11							
	5 00		7	7							
	5 50		2	2							
	5 55		1	1							



For instance: In the first inventory there were 152 pairs of pants costing \$2.50 each. In the second inventory taken after a sale of three weeks, there were 354 pairs of pants costing \$2.50 each; in other words, there were 202 more pants at \$2.50 on hand after the sale than there were at its beginning. This, of course, shows prices were altered and must have been lowered, for an expert buying merchandise would *not raise* prices on *himself*; and, in addition, the *high priced pants* in the second inventory are mostly missing.

Another instance: In the first inventory there were two mackinaw coats costing \$3.25. In the second inventory there were 21 mackinaw coats costing \$3.25, or, in other words, *there were nineteen more mackinaw coats* at \$3.25 on hand after a sale of three weeks than at its beginning.

The first inventory shows that \$3.25 represented the *lowest price mackinaw coat* in the store; so that the price on the nineteen excess coats must have been *lowered* from the higher priced ones (*for there was nothing from which they could have been raised*).²⁰³

These excesses occur continually for the reproduced exhibit herewith alone *clearly shows about 2000 excesses, or alterations in prices.*

Mr. Klink testifies as follows:

“I made a summary of these two inventories here, Inventory No. 1 and Inventory No. 2, Plaintiff's Exhibits ‘C’ and 4. That is of the first and second inventories in detail showing the number of articles and cost price of each. This is the sum-

mary showing the class and price of goods in which the second inventory exceeds the first."

Plaintiffs' Exhibit 19 offered and received in evidence.

"If a sale of this stock had been conducted between the dates of these two inventories, that is if the first inventory had been taken immediately before the sale and the second inventory immediately after the sale, then the difference between these two inventories gives the correct number of articles sold in these departments and the cost.

"I made an examination in detail of the departments comparing the total number of each article at a given price in the first inventory with those of a corresponding character and price in the second inventory; and the result is set forth in these summaries I have presented to the Court. In so doing I find in certain instances there were more articles of a similar kind at a given price in the second inventory than in the first. I find this condition in respect to every kind of article examined; for instance, suits, pants, overcoats, shoes, hats, sweaters. In fact I find these excesses throughout the entire comparison of the two inventories as far as I went.

"The inference of course is that there has been some modification and would call for an explanation by some competent person. I have no means of determining whether the prices in the 2d inventory were raised or lowered from the price in the 1st inventory. Possibly if the defendant's sales slips showed the cost prices they might be of assistance; that is if they showed the cost price of each article. Then if they did show the cost prices I would also have to know whether both their cost and selling prices were true and correct. If I had the correct cost price of every article sold on that sale I could account for these excesses.

"In the second inventory the excess articles in the suits over the first are 155.

"The excess of the pants over the first is 300.

“The summaries are in evidence.

“For instance take the article of mackinaw coats in the second inventory, Plffs. Ex. 4, with reference as to whether the prices in the second inventory have been raised or lowered from those in the first. The excess of these over the first inventory is 19. The lowest mackinaw coat price in the first inventory is \$3.25. There were two of these at that price. There were twenty-one at \$3.25 in the second inventory.

Mr. OLNEY. After a big sale of this Bridge merchandise lasting over weeks, Isaacs had more mackinaw coats at \$3.25 at the end of the sale than he had at the beginning?

Mr. SCHLESSINGER. I object to that.

The COURT. The objection is sustained.

Mr. OLNEY. Were there any cheaper coats set forth in that first inventory from which he could have made that excess of 19 by raising prices?

Mr. SCHLESSINGER. I object to that as not being expert testimony.

Mr. OLNEY. It is expert testimony.

A. *There were no cheaper ones.*

Q. Then prices on those coats *must have been lowered?*

Mr. SCHLESSINGER. I object to that as being argumentative.

The COURT. The objection is sustained.”

There is one fact of which there can be *no doubt*, and which has in no wise been contradicted by the defendant, viz., that this second inventory taken by this trustee for the purpose of buying in the stock for himself and on which he placed his percentage bid *did not represent* Bridge cost prices, as he claimed, but was greatly depreciated, i. e., prices were lowered, as testified to by Mr. Seynei whereby it was possible to cheat these insurance companies out of thousands of dollars. And

that is why Isaacs took Seynei into partnership—Seynei knew too much.

Main *knew too little*. He knew nothing of this depreciation, as he swears he *understood the inventory to have been taken at Bridge cost prices and the same as the first inventory*.²⁰⁴ Unless he knew of this material fact, no matter what his powers were, he could not bind the companies unless the fact of this depreciation and knowledge of it had been communicated to him.

This depreciation of that second inventory is indelibly there and wholly without a satisfactory explanation!

(l) **There were still other methods of depreciation of the second inventory employed by the defendant.**

By no means least of which in this connection are this trustee's famous sales slips offered the Court which show either they are some 1625 articles short *or else he depreciated this second inventory at least to that extent*.

In either case these complainants were directly defrauded by this defendant.

(m) **His own sales slips prove this depreciation.**

If Isaacs' sales slips are held to be correct, then the second inventory *must have been depreciated* to the extent of 1625 articles which are unaccounted for. This is corroborated by the evidence of Mr. Seynei that some of the best of the clothing, perhaps \$5000 worth, was laid away in the balcony at the close of the retail sale where the public could not see it.²⁰⁵

(204) Tr. p. 122.

(205) Tr. p. 54.

In view of the actual conditions as already referred to and shown by the record, *Isaacs defrauded these insurance companies if he excluded any articles from this second inventory; for it all had a selling value and it was all turned over to him.* The universal evidence was that the damaged merchandise was reconditioned and sold; Mr. Meyer testifying that even the burned merchandise was marked and that the smoked shirts, collars and underwear were marked and sold *above* their original Bridge inventory cost.²⁰⁶ Mr. Seynei²⁰⁷ and Mr. Jeremy both testified the badly damaged did not exceed \$500 and it was all marked. Mr. Jeremy testified the fire burned only the merchandise on one or two tables.²⁰⁸ Even Isaacs testified that the burned merchandise only amounted to \$300 or \$400 and that he sold the damaged underwear at various prices.²⁰⁹

Mr. Mason, the adjuster for the assignee to whose interest it was to make the damage appear as large and as exaggerated as possible, can only find 216 articles a total loss and he said this merchandise of no value amounting to \$300 to \$700 “*was all on one or two tables*” and *was all entered in the first inventory*²¹⁰ which was a basis for estimating the loss. What could be entered in the first inventory could be entered in the second inventory.

(206) Tr. p. 90.

(207) Tr. p. 45.

(208) Tr. p. 75.

(209) Tr. p. 152.

(210) Tr. p. 117.

The first inventory stipulated by all parties to be correct shows the exact number of articles a total loss to be only 216.

The exact number of articles omitted from the second inventory as shown by a comparison of Isaacs' sales slips (if correct) and the differences between the first and second inventories, are shown to be 1625 articles, including 49 suits (which at \$10 a suit would soon run into money), and 347 hats, et cetera (for detail, see herein pp. 116-117).

The evidence is overwhelming that the damaged merchandise practically all had some selling value and its being omitted from that second inventory (made by Isaacs for the purpose of his own percentage bid) was not on account of any damage to the merchandise but because Isaacs deliberately planned and schemed to cheat these companies and get possession of the stock for himself at a price way below its value for Mr. Seynei testifies "he depreciated it as much as possible so he would not have to account for it".²¹¹

Main was kept in complete ignorance of this depreciation, for he testifies he understood the second inventory to have been taken at Bridge cost prices the same as the first inventory, i. e., on the same basis as the first, that everything was included and that there was no depreciation allowed in the second inventory on account of damage.²¹²

(211) Tr. p. 59.

(212) Tr. p. 122.

(n) The amount of Isaacs' depreciation of the second inventory.

And the amount of the depreciation is testified to by Klink, Bean & Co. accountants, through their senior partner, Mr. Klink, as follows:

"The defendant represented to these complainants that he had in their fire sale sold Bridge stock for \$17,800. If this were sold at a profit of 20% as has been testified to, the cost of the goods so sold was \$14,800; and if we deduct this amount sold at cost prices from the first inventory of \$45,954, it gives a balance remaining of \$31,000. That is, *\$31,000 would be the amount of merchandise on hand after the insurance sale, at cost prices.*

"The second inventory, made by Isaacs, the defendant, only shows \$24,600. The difference between the two is \$6500.

"That is to say Isaacs' inventory, the second inventory, is \$6500 less than what the actual inventory would be if his purported insurance sale returns of \$17,800 were 20% above the original inventory cost prices. On this basis this second inventory of the defendant *shows a depreciation of \$6500.* If the insurance sale averaged more than 20% above cost this depreciation would be more."²¹³

Thus fact upon fact, circumstance after circumstance, of all these frauds and their insignia cumulate one upon another and are largely uncontroverted by the defendant even in his own testimony.

(o) The trial Court fails to recollect this evidence.

I cite your Honors to our assignments of error VIII, XV, XVI, XVII, XVIII and XXXI to the effect that the District Court erred in refusing to consider the foregoing evidence of fraud and depreciation and in

neglecting to refer to or consider the summary in evidence in figures proving irrefutably the same, Complainants' Exhibit 19; as this one exhibit alone is sufficient to compel a decree to include the setting aside of the sale in bulk and charging this trustee in a sum at least equal to the total of the depreciated second inventory.

(3) His Concealment.

- (a) Isaacs' statement to the complainants secretes the fact of his own purchase and commissions.

"The general doctrine with respect to concealment as a form of actual fraud, and as distinguished from those analogous violations of fiduciary duty which do not constitute actual fraud, but may be included in the term 'constructive fraud', may be stated as follows: If either party to a transaction conceals some fact which is material, which is within his own knowledge, *and which it is his duty to disclose*, he is guilty of actual fraud."

Pomeroy's Equity Jurisprudence, Sec. 901, Vol. 2, Third Edition.

This trustee's statement²¹⁴ of his handling of the trust set forth in the bill of complaint and forwarded the complainants by Isaacs keeps purposely from their sight and discovery the fact of the sale in bulk of their merchandise and that their trustee himself was the purchaser and had become its owner, *for it secretes the fact by making no mention of it.*

It was this trustee's duty to inform these complainants that their retail sale had been closed down, that

(214) Tr. p. 236.

their merchandise had been lumped off in bulk, and that he himself had become its owner, and of every material fact connected with the transaction; and it is a simple axiom that his failure so to do constituted active concealment. Assignments of Error, IV and VII (Tr. p. 171).

- (b) This concealment would have proved successful to date if it had not been for the Seynei suit and Judge Van Fleet's opinion.

The record shows this concealment was successful and that if Isaacs had not denied his partnership with Mr. Seynei, or as Mr. Bailey expresses it in his evidence "tried to rob Seynei of the goods,"²¹⁵ through compelling suit to be brought against him before Judge Van Fleet in the District Court, the *cestui que trust* would have had no knowledge of his duplicity in the transfer of the trust fund to himself without their knowledge; for the heads of the different complainant companies testify that they had no knowledge of it until after Judge Van Fleet's decision in the Seynei case and shortly before the beginning of this action.²¹⁶

(4) Isaacs' Misappropriation of Commissions on His Own Clandestine Purchase.

- (a) This trustee cannot claim any commissions on his own purchase and must return upon this accounting the \$2218 withheld from the complainants.

This trustee wrongfully appropriated to his own use \$2218 of the complainants' funds.

(215) Tr. p. 107.

(216) Tr. pp. 125-127.

This defendant on his final payment and statement to these companies secretly withheld \$2218 from them as commissions for selling to himself without their knowledge their own merchandise.

This concealment by their trustee thus constituted a fraud upon his beneficiary.

The fact of such retention of monies is undisputed upon the record and the defendant upon the stand even boasted that he did not allow his partnership to have a dollar of it. Also that within a few hours he sold the same identical merchandise to his firm of H. C. Seynei & Co. for \$11,094.²¹⁷ That profit belonged to the complainants and the Court erred in not so charging their trustee upon this accounting. Assignment of Error XI (Tr. p. 173).

Therefore this defendant upon the sale in bulk having withheld \$2218 from the complainants for secretly selling to himself merchandise valued at cost price at \$31,153 for \$8875 net, must return the same upon this accounting.

In *McGar v. Adams*, 65 Ala. 106, Judge Brickell tersely puts the very proposition as follows:

“An agent, who for a reward, is employed in the transaction of business, will justly forfeit all right to compensation if he is guilty of bad faith to the principal; and it would be singularly disloyal, if he is an agent to sell, for him to use the agency, and the trust and confidence reposed, to become, without the knowledge and consent of the principal, a purchaser, by a combination with others bidding for the property.

“If in ignorance of the facts the principal should make payment of the compensation, when informed of them, he may recover it back.”

If it is shown that the broker is the purchaser through another for the property of his principal he cannot recover any commissions.

Ryan v. Kahler, (Tex. Civ. App.) 46 S. W. 71, 72.

“In *Wadsworth v. Adams*, 138 U. S. 380, it is stated in the syllabus, which is a summary of the doctrine as to the right of an agent to the compensation agreed to be paid him, as defined in the opinion of the Court by Mr. Justice Harlan—

“It is a condition precedent to the right of an agent to the compensation agreed to be paid him, that he shall faithfully perform the services he undertook to render; and if he abuses the confidence reposed in him, and withholds from his principals facts which ought, in good faith, to be communicated to the latter, he will lose his right to any compensation under the agreement; being no more entitled to it than a broker would be entitled to commissions who having undertaken to sell a particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of the principal, the agent for another, to get it for him at the lowest possible price.”

Hall v. Gambrill, 92 Fed. 38.

The failure of the trial court to hold the defendant to a return of these commissions upon this accounting constituted error under our Assignments IX, and X (Tr. p. 172).

(5) His Gross Inadequacy of Consideration.

In the words of the Chief Justice of California:

“We think there can be no doubt under the authorities that where, in addition to gross in-

adequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage' resulting in such gross inadequacy and consequent injury to the owner of the property, *he will be deemed guilty of fraud* warranting the interposition of a court of equity in favor of the owner who is himself without fault."

Odell v. Cox, 151 Cal., at 75.

- (a) While trustee Isaacs transferred some two-thirds of the trust fund to himself for less than one-third of its value.

This trustee thus fraudulently gained possession individually of the trust fund in the manner previously described.

His purported bid was \$11,094 including his commissions of 20% or \$2218 on his own purchase, which deducted leaves \$8875 cash payment to the complainants.

The second inventory taken by himself as a basis for his own percentage bid shows the merchandise as only of the value of \$24,653, but which, in reality, as I have shown,²¹⁸ represented actually \$31,153 of merchandise at Bridge cost prices, thus rendering the amount actually paid by him really nearer *one-fourth* of its whole-sale value.

Isaacs' own handwriting and figures show the actual value of this merchandise in his own opinion to have been \$24,603.39.²¹⁹

His statement also to his partner Mr. Seynei at the time he thus wrote down the value of the stock as

(218) Herein pp. 179, 188.

(219) Herein p. 166.

\$24,603.39 was that it "*was worth one hundred cents on the dollar*".²²⁰

It was under his instructions that it was charged up against his partnership in the Seynei books as of the actual value of \$24,653.²²¹

And these books themselves made long before this cause came into being give mute evidence of its worth at that figure.

This sale in bulk was fraudulent as the Seynei books themselves establishing the prices he obtained for himself, show the price he claims to have paid to have been inadequate. Even Main on the stand admits that a better price might have been obtained. And Mr. Mason testifies:

"If it appears that the broker in such manner buys in the stock of merchandise inventoried at some \$24,000 cost price in bulk for himself at \$9000, I would not consider that his employers, the owners of the stock, had been fairly treated or received a square deal.

I presume in so buying the stock the broker would certainly expect to resell it at a profit. In such case where a broker purchases stock in bulk for himself and sells it at a profit for himself, the conditions being equal, he should have continued the sale at retail for the owners of the stock, and they should have had the profit."²²²

The price in bulk was inadequate, hence fraudulent, and these books together with the third inventory establish that fact.

(220) Tr. p. 63.

(221) Tr. pp. 61-62.

(222) Tr. p. 114.

- (b) This trustee's personal profits further show the gross inadequacy of consideration for the sale to himself in bulk.

These Seynei books and their summary by Klink, Bean & Co. show his partnership profits on this Bridge stock alone at the Seynei sale were \$1262.40 *above their original Bridge cost prices*, Isaacs' firm thus making a profit on them of 10% *above those Bridge cost prices*.²²³

- (c) This trustee's total receipts for the entire Bridge stock sold in bulk to himself were \$15,466 more than he paid these complainants for it.

If it be claimed the Seynei books show also new stock mingled with the old, our answer is that there was only \$6000 of new stock all told, and we shall estimate to the Court with extreme accuracy what that new stock, exclusive of the Bridge stock, sold for.

Allowing a generous profit to Isaacs for this new stock we can accurately determine what the Bridge stock itself sold for.

The Seynei books ²²⁴ in evidence show the total receipts during that sale were	\$16,067.94
The third inventory ²²⁵ taken at Bridge and original cost prices was held by Judge Van Fleet in Equity Cause 83, the Seynei case, to be the actual value of the tail end of this stock after the Seynei sale, viz.,	\$16,633.57
	<hr/> \$32,701.51

(223) Tr. p. 83.

(224) Tr. p. 227.

(225) Tr. p. 220.

The total amount of new stock	\$6253.78
which was sold at a profit of $\frac{1}{3}$ as was testified to, ²²⁶ amounted with that profit to	\$8,350.30

And which deducted leaves	\$24,351.21
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as the amount realized by Isaacs for the Bridge stock alone, being \$15,466 more than he paid for it.

In view of the above facts can it be truthfully said Isaacs' purchase price of \$8875 was a just and fair consideration for this stock in bulk? Isaacs knew the true valuation of this stock better than anyone else: he was tempted and he fell; and the manner of his falling was even more sinister as I have already shown.

The Court is respectfully referred to our Assignments of Error XII, XIII (Tr. p. 173); XIV (Tr. p. 174); XV (Tr. p. 175).

Conclusion.

Isaacs' figures and totals false and untrue.

A review of the facts as disclosed in the foregoing pages and uncontroverted by this defendant, of direct misrepresentation of both the value and condition of the stock, of his fraudulent methods employed in obtaining the stock, of his forming a clandestine partnership to own the stock, his elimination of competitive bids, his lowering of his own bid, his depreciation of the second inventory, his concealment, his gross inadequacy of consideration as shown by his personal profits, all and each show that his clandestine sale in bulk to himself was a direct fraud upon these complainants and must be set aside.

There has been an utter failure of proof on the part of this trustee. He alone claims his gross receipts were only \$17,800 at the complainants' retail sale. The explicit evidence of seven witnesses against him is to the effect that the merchandise was marked and sold at an average of 20% above its original Bridge cost in the first inventory.

That being so then the merchandise sold at that insurance retail sale cost only \$14,800 (Bridge cost prices) (instead of \$21,301 as claimed by Isaacs), which deducted from the first inventory of \$45,954 leaves \$31,153, the amount of merchandise which the second inventory should represent,²²⁷ if not more.

This depreciated second inventory made by Isaacs only showed \$24,653 merchandise on hand after the complainants' retail sale, which is \$6500 less than it should be.²²⁸

This amount should be added to the amount of his depreciated second inventory, making \$31,153; and following all precedents this trustee should be charged with the full value of this merchandise he sold so quietly to himself, together with his profits and interest, and together with the return to the complainants of the \$2218 commissions on the sale in bulk withheld from them by this defendant as their trustee as commissions on his own clandestine purchase (Assignments of Error X, XI, XII, XIV, XV, Tr. pp. 173-5).

(227) Tr. p. 83.

(228) Tr. p. 84.

THE SALE IN BULK.**(B) THE LAW.**

Under these circumstances shown in the foregoing facts, it was not even necessary for the complainants to show that their trustee committed *actual* fraud in acquiring their large stock of merchandise in order to set the transaction aside. The law is well settled that a trustee cannot purchase his beneficiary's property, without the latter's knowledge and consent. And it is not necessary, in order for the *cestui que trust* to set such a transaction aside, to show that actual fraud has been perpetrated in the consummation of the sale, or that he has been damnified in any way, or that the price paid was inadequate, or that the transaction was unfair in any particular; *though, in the cause at bar, the complainants have shown all these.*

V.

**THE LAW GIVES THE BENEFICIARY THE ABSOLUTE RIGHT
TO REPUDIATE SUCH A TRANSACTION AT HIS MERE
OPTION WHEN APPRISED OF THE FACTS.**

The American courts state the rule and its reasons very clearly in

Porter v. Woodruff, 36 N. J. Eq. 174, at 179,

in the following language:

“The legal principle to be applied in deciding whether the defendant can successfully resist the complainants' claim is too firmly established to warrant even the most astute and courageous counsel in attempting to overthrow it, or to narrow its scope.

The general interests of justice and the safety of those who are compelled to repose confidence in others alike demands that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase can he himself be the seller. The moment he ceases to be the representative of his employer and places himself in a position toward his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer an agent but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought into conflict with those of his employer, look upon his employer's interests as more important and entitled to more protection than his own.

In such cases the courts do not stop to enquire whether an agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage,

but they at once pronounce the transaction void because it is against public policy.

The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he cannot betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against an agent acting in a dual character is broad enough to cover all transactions. * * *

In *Michoud v. Girod*, 45 U. S. 502, at 556, the Court said:

“ * * * The enquiry in such case, is not whether there was or was not *fraud in fact*. The purchase is void, and will be set aside at the instance of the cestui que trust, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. * * * *Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact?*”

In *Wormley v. Webb*, 44 Mo. 444, at 451, the Court said:

“ * * * Nothing is better settled than that an agent or trustee, or person acting in a fiduciary capacity, cannot speculate for his private gain with the subject matter committed to his care, to the prejudice of his principal. He cannot be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser. The law does not presume

that such a transaction will always be impressed with fraud, but *it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the utmost conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation.* * * * ”

In *Mills v. Goodsell*, 5 Conn. 475, at 479, the Court said:

“ * * * It is idle to enquire into the fairness or unfairness of transactions of this character; whether the sale, under all the circumstances, was or was not the best that could have been made. * * * It is in vain to urge that he gave more than any one else would. * * * *The law cuts up, root and branch, the power to purchase, and the temptation to defraud. It will not permit an enquiry into the fairness or unfairness of the transaction.*”

In *People v. Overysse*, 11 Mich. 222, at 228, Judge Manning said:

“ * * * *If such contracts were to be held valid until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact.*”

In *Bain v. Brown*, 56 N. Y. 285, at 288, Judge Rapallo incisively wrote:

“ * * * *When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.* * * * ”

(a) Isaacs' technical sale to Seynei cannot aid him.

And the rule is the same where the agent purchases his principal's property jointly with another—the rule affects both the agent and his co-purchaser alike.

Thus in *Reeves v. Calloway*, 78 S. E. (Ga.) 717, at 720, the plaintiff had employed defendant, Etheridge, an attorney, to advise and represent him in the sale of his land. A sale was made to defendant Calloway. Afterwards, it developed that Etheridge was interested with Calloway in the purchase. The Court said:

“ * * * *The principle applies as well to a case where the agent joins with a stranger, who has knowledge of the agency, in making the purchase as where the agent is sole purchaser. In such case the proportions of the purchase money paid by the purchasers is an irrelevant fact. It is immaterial whether the agent's partner in the transaction furnished all or a part of the money, if he knows of the agency and joins with the agent in the purchase of the property on joint account, or for their mutual benefit. The policy of the law forbids an agent employed to sell to place himself in an attitude of antagonism to the interest of his principal by associating himself with another in the purchase, and a sale by an agent without the express consent of his principal to himself in association with another, with knowledge of his agency, will be set aside at the instance of the principal.*”

To the same effect in

Reardon v. Washburn, 59 Ill. App. 162.

(b) Nor does Isaacs' purported “auction” aid him.

“This rule of the civil law is practiced upon in our courts of equity and applied to trustees, agents, and generally to all persons who have been employed in a confidential character in relation to

property. *And it is immaterial whether the sale be made privately or at public auction, the reason of the rule is as strong in the one case as the other.*"

Saltmarsh v. Beene, 30 Am. Dec. 525, at 526.

And Mr. Justice Story, in the case of

Church v. Marine Ins. Co., 1 Mason 344,

thus clearly sums up and states the universal rule:

"Nothing can be better settled than that an agent or trustee cannot, directly or indirectly, become the purchaser of trust property which is confided to his care. The law will not suffer any man to earn a profit or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at public or private sale. *This case, then, stands before the Court as if there was no sale; the ownership has never been legally divested.*"

(c) *Isaacs' attempt to evade the rule.*

This trustee, upon this accounting, practically admits substantially the facts to which we have referred in the foregoing pages, save the depreciation of the second inventory (*upon which subject he remains stone dumb*), but hides behind the technicality that he told George C. Main, an adjuster on the original loss, about the sale in bulk, and therefore is immune from attack, claiming Main to have been the agent of these complainants, and that alleged communication of the facts to him was so communicated to them.

This trustee says in brief: "Ah, yes, that is the general rule, but I took the precaution to tell my friend Main all about everything, and his knowledge is the

company's knowledge—so—‘*What are you going to do about it?*’ ”

The obligations of a trustee, however, who is acting for another whose relation is fiduciary, does not stop with asking the foregoing question. There are certain specific burdens which rest upon him. And when the matter comes to be submitted to the test of judicial scrutiny, the trustee cannot sit still in a court of equity and say, “Prove that I did not do my duty.” He is required by the law to come forward and make an affirmative showing; and the transaction will be set aside unless he shall present clear and satisfactory proof that at least three essential elements were present:

(1st.) That the one to whom he claims to have imparted the information was in the employ as general agent of those he seeks to bind;

(2nd.) That the information he claims to have imparted contained every material fact known to the trustee which might affect the principals, and that, having such knowledge, the principals fully consented to the transaction;

(3rd.) To show affirmatively that the entire transaction was fair, free from fraud or misrepresentation; and that the trustee did everything which ought to have been done and did nothing which ought not to have been done, for the *cestui que trust*.

Yet he has not done so.

Mr. Main's deposition was taken by the complainants in Seattle in the month of July before the trial in San

Francisco the February following; and his refusal to come to San Francisco as a witness for the companies for rebuttal of Isaacs upon that trial is to be regretted. He has since died from the causes which were beginning prominently to manifest themselves at the time of the fire. And so, this defendant, upon the trial, could narrate *ad libitum ad nauseam* any concocted conversations with Main secure in the knowledge Mr. Main would not be present to refute it. Yet, with every circumstance arranged so eminently in his favor, Isaacs outside of his own self-serving declarations of these conversations, can point to not one single line of the record which shows or even remotely intimates that Main was the agent of or had specific authority at any time from these complainants at the time of the sale in bulk; or further, *had personal knowledge of Isaacs' frauds and misrepresentations*. In fact on his direct examination Main squarely testifies that at the time of the bulk sale he had *no* knowledge that Isaacs was a bidder and bought the stock:²²⁹ and that he thinks he was out of town at the time of the sale: and that it was not until *after* the sale in bulk that he "understood" what was paid for it, and at which time, whether three months or longer after the sale there is nothing to show, he displays the greatest lack of accurate knowledge and authority and the most he can say is, "I understood." Main knew nothing about the stock or its condition at the time of the sale in bulk; swears he made no examination of the stock, and had nothing to do with the making of the second inventory:

(229) Tr. p. 121.

“The inventory of \$24,000 I did not make. Isaacs made it. I understood perfectly it was based on the Bridge inventory price. I did not make it so that I could not swear positively. But it was about forty-five per cent of that inventory, which I understood was the purchase price.”²³⁰

Isaacs himself states he does not know whether Main was in Seattle at all for the two weeks preceding the sale in bulk.²³¹

(d) Main a complaisant tool and ignorant of Isaacs' frauds.

At no time does Main give evidence of any actual personal knowledge of the real state of affairs, and of what actually did happen, but tries to help his friend by vague conversations, he does not know when or where.

(e) Not in the employ of complainants at time of sale in bulk.

If Main had been actually at the time of the sale in bulk an out and out representative of the companies he certainly would not have betrayed his trust to the extent that all this ignorance and indifference would indicate. Main felt no responsibility; his authority was clearly at an end. At no time is permission asked of or given by Main; for at all times we have Isaacs in the role of mentor, directing and disposing. Even if all Isaacs' narration of self-serving conversations with Main were Gospel, there is an utter absence of proof that at the time Main was acting as the agent of the complainants with authority from them or that the con-

(230) Tr. pp. 121-2.

(231) Tr. p. 158.

versations were heard by any ears save those of Main as a volunteer taking a friendly interest in Isaacs' doings, but whose authority had long since ceased and determined with his adjustment of the loss with the assured. As Mr. Bailey says:

“When he (Isaacs) first came he indicated to me that he was such a high up representative of these complainants that he dealt only with the heads of these companies and the head representative at San Francisco; that he was above all the other adjusters and had nothing to do with them.”²³²

Main gained his livelihood by working for many insurance companies as an independent adjuster and was paid by them for each individual job as he completed it. The sale in bulk was September 29, 1913. On September 8th, as appears by the record in this cause, he rendered to the complainants a bill for his services in connection with the Bridge loss and was paid off.

He writes therein as follows:

“I have spent a good deal of time on this adjustment which accounts for the size of my bill, and believe it has been worth while. The stock has practically been in my charge for a number of days and all the details in connection with the care of same have been looked after by me *until the arrival of Mr. Isaacs on Friday last.*

Receipted voucher in duplicate is enclosed covering my services and expense and trust all will be found satisfactory.”²³³

(232) Tr. p. 104.

(233) Tr. p. 235.

Although his entire correspondence and records of all kinds are in evidence²³⁴ they do not show he received further instructions or authority from these complainants, or that he was authorized to act further in the matter: nor was he paid for any further services in the premises.

“There is abundant authority to the point that notice to an agent to be notice to his principal must be given to him while acting in the course of his employment.”

Wittenbrock v. Parker, 102 Cal. 102.

It is not sought here to charge these companies with any actual notice of Isaacs', their trustee's, wrongdoings, or of any knowledge of facts to put them on enquiry as to the fraud and deceit practiced by this trustee upon them. The defendant's contention in this respect turns upon the point of the constructive notice to the principal of the facts within the knowledge of Main, their alleged agent—upon the happening of the frauds and deceit in question.

A principal, will, of course, *in the absence of fraud*, be bound by the knowledge of his agent, and will, in law, be deemed to have constructive notice of such knowledge. *But*, in order to even thus bind the principal by knowledge possessed by the agent it is essential that the information

“be obtained by, or imparted to, the agent while he is in fact acting as agent—while he is actually engaged in doing his principal's business, in pursuance of his authority, and in his character as agent.”

Pomeroy's Eq. Jur., Sec. 670.

Within these limits and to this extent there has been but little divergence of opinion on the part of the courts either in England or America, and the doctrine is elementary.

In the case at bar it does not appear that Main, who was not in the regular employ of the companies, but who acted for them merely upon the adjustment of this individual loss with the assured, acquired any knowledge in relation to Isaacs' acts (the misrepresentation of the value and condition of the stock, the fake auction, his dropping down his own bid from 47% to 45%, the secret sale to himself through a dummy, the secret partnership with Mr. Seynei, the false returns of the retail sale, the depreciation of the second inventory) during the time he was engaged for these companies. It nowhere appears, in fact, that he had any knowledge or notice whatever of them. Whatever notice *if any*, he had of Isaacs' frauds and wrongdoing, was obtained *after his authority from the companies had ceased*, and, as I have said, he had rendered his bill and been paid off *before* the fake auction, the lowering of the bid, the clandestine sale in bulk to the defendant, the secret partnership with Mr. Seynei, and the depreciation of the second inventory.

The differing authorities are all as to knowledge of the agent as to transactions *prior* to his employment, such as the Distilled Spirits case, 11 Wall. 356, but even as to this rule the Courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits.

There is, however, no citation or precedent anywhere that knowledge of the alleged agent *after* his authority has ceased and he has rendered his bill and been paid off can estop the principal from enforcing rights, as no knowledge has come to him.

(f) **The complainants' position as to Main in this cause.**

There was of course no question as to Main's authority as an adjuster in the adjustment of the loss with the assured; but he had no authority to bind the companies thereafter, the complainants' position being as follows:

1.

That Main was merely an independent adjuster not in the regular employ of the complainants; and had no authority from them after his settlement as adjuster of the loss with the assured.

2.

That no further authority beyond that settlement has been shown by the defendant, upon whom rests the burden of proof.

3.

That no such authority can be presumed.

4.

That starting for the sake of argument with the hypothesis that he had further authority explicitly from the companies after such adjustment, that knowledge of the falsity of Isaacs' figures and totals and his depreciation of the second inventory,

as exposed and proved by the complainants, for his purchase of their merchandise in bulk, has not been brought home to Main by the defendant upon whom rests the burden of affirmative proof.

VI.

MAIN'S AUTHORITY TO BIND THE COMPANIES CEASED WITH HIS ADJUSTMENT OF THE LOSS BY THE COMPANIES' PURCHASE OF THE MERCHANDISE FROM THE ASSURED AT \$34,300.

The burden of proving *affirmatively* the agency and powers of ratification of Mr. Main rests squarely upon the shoulders of this defendant. Mr. Main was merely an adjuster, he says so himself, and the evidence nowhere shows he was anything else. That he was the companies' adjuster on this loss is freely admitted. His powers went no further, and if the defendant claims they did the burden was upon him to prove affirmatively his contention; and there has been an utter absence, an utter failure of proof.

The burden of proof to establish ratification or acquiescence is upon the defendant.

1 *Greenleaf on Ev.*, Sec. 74;

2 *Pomeroy Eq. Jur.*, Secs. 816 et seq., Sec. 965.

Your Honors will, of course, take judicial notice of the statutes of the State of Washington in which State this loss occurred. Under those statutes an adjuster is defined as follows:

“ ‘Adjuster,’ or ‘Insurance Adjuster,’ is a person, copartnership, or corporation, who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against.”

Insurance Code, State of Washington, Secs. 6059-62.

And in this regard your Honors’ attention is respectfully called to Assignment of Error XXII (Tr. p. 182).

Such was Mr. Main, an ordinary insurance adjuster (and it nowhere appears otherwise) of limited authority to ascertain and adjust the loss with the assured. And in this connection and bearing directly in point, I urge your Honors’ careful reading of the late case of

Manheim v. Standard Fire Ins. Co., 145 Pac. 992, a Washington case decided by the Supreme Court on appeal, which exactly and clearly defines an adjuster and his duties and when his authority to bind the companies ceases, holding that where a statute defines the duties of an insurance adjuster no presumption of authority to perform other duties can arise from the mere fact that he acted as an adjuster; in which the Court says:

“There is no showing that Mr. Jones occupied any position other than that of an adjuster, or that he was authorized to bind the respondent corporation by waiving any of its rights. All he was authorized to do was to investigate the fire, ascertain as nearly as possible the loss which appellant had sustained, and report his findings to respondent. An adjuster and his duties are defined by Section 2 of Chapter 49, Session Laws, 1911, at page 163, in the following language:

“Adjuster,” or “Insurance Adjuster,” is a person, copartnership or corporation who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against.’

No evidence was presented showing or tending to show that any additional authority was conferred on the adjuster by respondent, which would have the effect of empowering him to waive any of respondent’s rights, or to admit or deny its liability. In the absence of some such showing, his only authority would be to investigate the fire, the amount of property destroyed, and the actual loss sustained, and report his findings to respondent, so that it might determine the question of liability.

The statute having defined the duties of an adjuster, no presumption that he had authority to perform other duties, and thereby bind the respondent, can arise from the mere fact that he was acting as an adjuster.”

The Court’s attention upon this point is called to Assignment of Error XXIII (Tr. p. 183).

Mr. Main’s own testimony shows he did nothing thereafter except to forward for Isaacs his final payment to the companies. His own testimony on this head is as follows:

He never saw or examined any books or records covering the sale by Isaacs and did not even ask to see them. He did not examine any books when Isaacs made his final payment to the complainants. He was not familiar with the time when the bids were asked for and never saw the advertisement. “The stock was wholly in Isaacs’ hands. I had nothing to do with it. He could do as he pleased.”²³⁵ He only learned by hearing

from Isaacs there were several bidders. He never saw any bids. He never examined the stock after the first inventory and never asked Isaacs for a statement in detail. He never received any reports from Isaacs, denying emphatically that the sales slips were ever sent to him as such or in any wise, but that Isaacs used his adding machine to foot them up for his own purposes (but which adding machine totals Isaacs refused to produce upon the trial); and that he, Main, did not know what Isaacs' daily sales were.²³⁶ He never received any monies except to forward for Isaacs the final amount to the companies, purely a volunteer service.

His attitude and conduct was that of a disinterested person.

Main himself two days after Isaacs opened up the retail sale for these complainants showed that he considered that his authority was at an end by forwarding to the complainants a final report on the loss September 8, 1913, which is in evidence, and being paid off at that time. He demanded nothing further for any services. All of his correspondence with the complainants which is in evidence does not show that he ever received or demanded any payment for any service after the immediate settlement of the loss, showing he did not consider himself still in their employ, not even when he forwarded for Isaacs the defendant's final payment of \$1094, for he made no deduction from it, and acted purely as a volunteer.

(236) Tr. pp. 122-3.

Main evidently considered his services at an end on September 8, 1913, for he assumed no further responsibility or interest in the matter and never communicated to the complainants any information as to the retail sale or as to the final disposition of the merchandise in bulk; and there is nothing to show he represented the companies, while on the other hand *Isaacs paid himself directly from the complainants' funds*, of which Main had no knowledge. The trial Court erred in holding otherwise. Assignments of Error XXX (Tr. p. 187), XXI (Tr. p. 181).

There is no evidence that the complainants knowingly permitted Main to exercise any authority after the stock passed into Isaacs' hands; nor had they any knowledge of any of Main's acts after that; nor is there any evidence to show that Main communicated with them concerning the disposal of the stock either at retail or in bulk after Isaacs took control.

Moreover, Mr. Goodwin and the four other Pacific Coast managers of the complainants, testified that "Main was only an independent adjuster, with only an occasional loss referred to him to adjust; that he was not one of the companies' men, nor a salaried employee."²³⁷ So *prima facie* Main was *not* in the employ of the complainants after the adjustment of the loss with the assured, nor at the time of the sale in bulk.

On the other hand we have the clear cut agency of Isaacs as trustee direct with these complainants as his

(237) Tr. p. 125.

beneficiary as specifically alleged with Main eliminated, whose work and authority as an adjuster had ended. This defendant thus became trustee direct for these complainants, and, as alleged in the bill, and uncontradicted by the answer "did actually take over into his *exclusive* and *sole* possession and *contol* their said stock of merchandise and as their trustee proceeded to sell the same", this trust fund. Assignments of Error XXIV and XXV (Tr. p. 183).

There nowhere appears the slightest communication by Isaacs to the complainants of information of any kind to give them knowledge he was the purchaser of their merchandise at a sale in bulk or had charged them commissions of \$2218 on his own purchase, or had realized for it \$15,466 more than he had paid them for it, for in his final statement to the complainants he carefully omits all mention of it.

VII.

BUT EVEN ON THE HYPOTHESIS OF MAIN'S AGENCY THIS SALE IN BULK MUST UNQUESTIONABLY BE SET ASIDE UPON THIS ACCOUNTING UNLESS THIS DEFENDANT PROVES MAIN HAD KNOWLEDGE OF ALL THE FOLLOWING FACTS, AS JUDGE SCHOFIELD APTLY SAYS:

"The doctrine is familiar, and has been often recognized by this Court, that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, *after full knowledge of every matter known to the agent which might affect the principal.* It is of no consequence, in

such case, that no fraud was actually intended, or that no advantage was in fact derived from the transaction by the agent. The rule is not remedial of wrong actually committed,—it is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the Chief Justice in *Staats v. Bergen*, 17 N. J. Eq. 554, that ‘a trustee may not put himself in a position in which, to be honest, must be a strain upon him.’ An agent may undoubtedly buy of his principal, or have an interest in the sale of property belonging to his principal; but in such case the *burden is upon the agent* to show that the principal had knowledge, not only of the fact that the agent was buying or interested, *but also of every material fact known to the agent which might affect the principal, and that, having such knowledge, he freely consented to the transaction.*”

Tyler v. Sanborn, 128 Ill. 136, at 142; 15 Am. St. Rpts. 97.

Main certainly had no knowledge of the following facts and the defendant fails to show affirmatively that he had; and there is not one iota of evidence in the record to show that he had. Assignments of Error XXVI (Tr. p. 184), XXVII (Tr. p. 186), viz.:

1. At the time of the bulk sale Main did not know Isaacs was the purchaser, for he testifies: “I was out of town at the time of the sale in bulk and had no knowledge Isaacs was a bidder and bought the stock; he told me so *afterwards*.”²³⁸ There is not a line of evidence to show whether it was 3 months or a year afterwards that he learned Isaacs bought the stock, or whether before or after the commencement of the present action.

(238) Tr. pp. 120-1.

2. Even Isaacs himself admits it was *afterwards* he had his conversations with Main in this regard but only as to the *amount paid*: how long—whether three months or a year, he does not state and thus he evades the issue—but one thing is quite apparent and that is, that nowhere and at no time does he testify that he told Main before rendering his final statement to these complainants *that he himself was the purchaser*.

3. There is nothing in Isaacs final statement to the complainants to show that he was the purchaser of their merchandise. He says that before sending the statement he went over its items with Main,²³⁹ *but he might have discussed the statement a million times with Main and yet Main from the face of the statement could never have discovered Isaacs' interest in the merchandise*.

4. Main flatly contradicts Isaacs for he testifies he did not and could not verify Isaacs' statement and figures as Isaacs was in San Francisco.²⁴⁰

5. But the *strongest evidence of all* that these facts were concealed from Main is the *admitted fact* that Isaacs *bought the stock in Seynei's name*;²⁴¹ *that he did not appear publicly as a bidder in his own behalf*;²⁴² that his partnership with Mr. Seynei was a secret and not a public one;²⁴³ and that when he conducted the

(239) Tr. p. 153.

(240) Tr. p. 120.

(241) Tr. p. 55.

(242) Tr. p. 101.

(243) Tr. p. 61.

partnership sale he did not even conduct it in the partnership name of "H. C. Seynei & Co." but under Mr. Seynei's individual name—"Harry Seynei."²⁴⁴ Mr. Seynei testifies that Isaacs compelled this secrecy and directly stated that he did this in this way "*as he didn't want Main and the insurance companies to know he was actually the owner of the stock.*"²⁴⁵

There is nothing in Isaacs' evidence to show that he told Main at the time he was the purchaser; and there is nothing in his statement to the companies to show he was the purchaser.

Defendant's counsel filed 456 amendments to the statement of evidence, 10 pages of revised amendments and 35 additional amendments, yet he was utterly unable to find any proof that Main knew at the time Isaacs was the purchaser. On the other hand, we have the direct statement from Main that at the time of the sale he had *no knowledge* that Isaacs was the purchaser.

6. Main did not know the name of Seynei was used as a blind, for at no time does the evidence show that Isaacs told Main he would use Seynei's name. Nor does the evidence show that Main at any time had any knowledge of Isaacs' secret partnership with Seynei.

7. The very utmost that can be claimed for Main is Isaacs' own statement that during some vague conversation Isaacs thought it best to sell the goods off

(244) Tr. pp. 221-2-3-4.

(245) Tr. p. 54.

under sealed bids, and Isaacs "suggested" he might put in a bid himself, and the vagueness even of this the defendant's own story enforces scepticism.

8. Main did not know Isaacs had made arrangements with Mr. Seynei for the elimination of any bona fide competitive bids.

9. Main did not know the sale in bulk was a "fake".

10. Main did not know that some of the best merchandise in the store was taken by Isaacs and laid away in the balcony, some \$5,000 worth, and was not open to public inspection for the bulk sale.

11. Main did not know the stock for the bulk sale under Isaacs' directions was so arranged as to make it look as cheap as possible and as discreditable as possible, as testified to by Mr. Seynei and Mr. Jeremy (Tr. pp. 57 and 78).

12. Main said regarding the sale in bulk "*I had nothing to do with it*". What could be plainer? And further he testifies "*It was wholly in Isaacs' hands*".²⁴⁶ Not only did Main "have nothing to do with it" but the actual facts and happenings at that sale were concealed from him.

13. Main did not know there were no bona fide bids.

14. Main saw no bids. All he can say in this regard is, "*I have heard*" three men put in bids.

15. Main testifies he was out of town when the complainants' merchandise was advertised by Isaacs

for sale in bulk. He did not know it was advertised only one day; that the bidders in San Francisco and Portland had not been notified; and that Isaacs made no proper effort to obtain competitive bids. Isaacs testifies he didn't know whether Main was in Seattle at all during the two weeks preceding the sale in bulk.²⁴⁷

16. Main did not even examine the stock at the time of the sale in bulk.

18. Main did not know that Isaacs lowered his own bid from 47% to 45%, thus reducing the amount of his bid \$492 and thereby making a false total of \$11,094 instead of \$11,586.

19. Main did not know the bid of \$11,094 was in reality only 35% of cost instead of 45% as represented by Isaacs.

20. Main did not know Isaacs misrepresented the *condition* of the stock when he stated it was all run down.

21. Main did not know Isaacs misrepresented the *value* of the stock when he stated there would be a loss in conducting the retail sale any longer.

22. Main did not know Isaacs misrepresented the *facts* when he told him the expenses were over \$200 a day and the receipts were down to \$400 a day "and running down and down".

23. Main did not know that the actual receipts for the last week of that sale averaged over \$600 a day²⁴⁸

(247) Tr. p. 158.

(248) Tr. p. 246.

according to Isaacs's own depreciated figures in his purported "cash book" and that the expenses were less than \$125 a day.

24. Main did not know (when Isaacs said he thought it best to sell the stock under sealed bids) *that Isaacs had already formed a secret partnership four days after the opening of the retail sale for the very purpose of buying that same stock* ²⁴⁹ *and had made arrangements for renewing the lease on the Bridge store.*

25. Main's permission was not asked or granted with regard to the sale in bulk by Isaacs to himself.

26. Main did not know how much stock was left as he says he did not examine it at all just before the sale in bulk.

27. Main did not know that Isaacs made the second inventory of \$24,653 for the express purpose of a basis for his own percentage bid.²⁵⁰

28. Main did not know Isaacs misrepresented the true value of that stock in that second inventory.

29. Main did not know when Isaacs upon the sale in bulk claimed the highest bid was 45% of the original Bridge cost price that Isaacs had depreciated those cost prices thousands of dollars in that second inventory: *for Main repeatedly states he understood that second inventory was taken at Bridge cost prices the same as the first inventory and that there was no depreciation on account of any damage.*²⁵¹

(249) Tr. p. 53.

(250) Tr. pp.53-58-59.

(251) Tr. p. 122.

30. Main did not know that in the taking of that second inventory as a basis for Isaacs' bid the *high priced goods were mixed with the low* and entered in that second inventory at prices far below the original Bridge cost prices on the sales tags.²⁵²

31. Main did not know Isaacs omitted some of the best merchandise from that second inventory and put it out of the way in the balcony.

The defendant has signally failed to show affirmatively that Main had knowledge of any of the foregoing.

(a) At no time and nowhere in the record has this trustee claimed Main had knowledge of his depreciation of the second inventory.

It would be a far cry indeed to imagine that either Main or the complainants knew of Isaacs' depreciation of the second inventory for his personal gain, and that instead of its representing \$24,653 of Bridge merchandise at Bridge cost prices it in reality represented \$31,153 of Bridge merchandise at the Bridge cost prices.

If Main, on the continuing hypothesis of his agency, had no knowledge of Isaacs' depreciation of the second inventory, the sale in bulk by this trustee to himself must be set aside upon this accounting, and the defendant charged with the actual inventoried value of the merchandise in his depreciated second inventory, viz., \$31,153.

Is there not every indication that Main was intentionally deceived as to the true value of and condition and facts surrounding that stock of merchandise?

The five Pacific Coast managers of the complainants testify none of these facts were communicated to the companies;²⁵³ and the rule is that

“Nothing will defeat the principal’s right of recovery except his own confirmation after full knowledge of the facts.”

2 Pomeroy’s Eq. Jur., Secs. 959, 964.

Isaacs’ statement²⁵⁴ to the companies enclosing the final balance of \$1049 itself shows *prima facie* that the sale by Isaacs to himself was not communicated, for he makes no mention of it, and his non-mention of this most material fact constitutes active concealment.

On the hypothesis that Main was an agent of the complainants at the time of the sale in bulk, can it be said that he accepted Isaacs’ final statement in evidence *“with full knowledge of all the facts”*?

Can ratification be impugned to an agent who is ignorant of the conditions?

Can one ratify something of which he knows nothing?

Yet now it is claimed without any proof on behalf of this defendant, that there was a ratification!

It is an affront to conscience to even suggest that such a story as is told by the foregoing facts is to be regarded by a court of equity as a ratification of any transaction conceded to have been tainted by such misconduct of a trustee.

(253) Tr. pp. 125-7.

(254) Tr. p. 236.

- (b) No conflict in the authorities, yet trial Court held contrary to the established rule.

The rule is stated by Mr. Pomeroy (2 *Pomeroy's Eq. Jur.*, Sec. 959) as follows:

“The mere fact even that a reasonable consideration is paid and that no undue advantage is taken is not of itself sufficient. Any unfairness, any underhanded dealing, *any use of knowledge uncommunicated to the principal*, any lack of the agent's good faith which Equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal.”

In *Mechem on Agency* (Sec. 466) the author says:

“When the transaction is seasonably challenged a presumption of its invalidity arises *and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him.* The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; *and that there was no suppression or concealment which might have influenced the conduct of the principal.*”

There is no conflict in the authorities as to the equitable rule applicable here and it is indeed remarkable that the trial Court should have rendered a decision directly conflicting therewith. The matters referred to in its opinion fail entirely to meet any of the objections to the validity of the transaction of the sale in bulk particularly and of the specific evidence of *misrepresentation, actual fraud, concealment and misappropriation*

and in view of this uncontradicted evidence in this cause, the decree and decision heretofore rendered in the Court below should be reversed.

VIII.

ISAACS CANNOT CLAIM THE BENEFIT OF ANY CONTRACTUAL RELATION IN AGENCY AS HE WAS COMMITTING A TORT.

When Isaacs stepped out of his character as trustee and attempted by misrepresentation, actual fraud, concealment and misappropriation secretly to appropriate the balance of the trust fund for the very inadequate consideration of \$8875 net, he stepped out of his contractual relation (*if any*) with Main, and thereafter proceeded *not* in contract *but* in tort. Assignment of Error XXIX (Tr. p. 186).

As was said in a somewhat similar case:

“But the sale was not made under respondent’s contract of agency, *but in their own wrong*, and whatever the rights of the parties might have been, had the sale been made in the character of agents under the original contract, I think they are chargeable for the full value.”

Jeffries v. Wiester, 13 Fed. Cas. No. 7254,
p. 436.

When a trustee steps out of the scope of his trust and undertakes to transfer his beneficiary’s property to himself, he acts beyond the authority of his trust, and his acts become invalid and cannot be sustained. Such transfer is simply void; no right of title passes;

the legal and equitable title remains as it was before the attempted transfer.

Pomeroy's Eq. Jur., Sec. 1088.

"The effect of even a partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely and to operate as a personal bar to the party who practiced it."

Butler v. Prentiss, 158 N. Y. 50.

IX.

MAIN BY SILENCE COULD NOT AUTHORIZE, RATIFY OR SANCTION AN ACT HE COULD NOT EXPRESSLY AUTHORIZE, SANCTION OR APPROVE.

HE COULD NOT PERMIT OR AUTHORIZE ISAACS TO DO WITH THE TRUST ESTATE THAT WHICH HE COULD NOT DO HIMSELF (Assignment of Error XXVIII, Tr. p. 186).

If the Court takes the remote view that the adjuster's authority did not end with the adjustment of the loss with the assured (though no further authority is disclosed by the record) I respectfully refer your Honors to the case of *Gilbert v. Hewetson*, 79 Am. St. Rep. 486, at 492, which is very akin on the question of Main's claimed ratification of Isaacs' acts under the hypothesis of Main acting as the agent of the complainants, to the effect that an agent cannot authorize, sanction, or ratify an act performed by another which he could not do himself. Judge Brown says:

"He was himself an agent, a trustee of an express trust, and he could not permit or authorize his agent to do with the trust estate that which he himself could not do. He could not speculate in the trust property to his own advantage and benefit,

nor could he authorize his agent to do so. *It would be a perversion of the law to hold that an agent could, by his silence, authorize, ratify, or sanction an act he could not expressly authorize, sanction or approve.*"

I also urge upon your Honors' attention the leading case in California on the proposition,

Burke v. Bours, 92 Cal. 108 (approved 97 Cal. 374; 121 Cal. 287; 142 Cal. 641; 147 Cal. 449; 5 Cal. App. 232; 9 Cal. App. 232),

which is well digested in the headnote as follows:

"Where a subagent authorized to sell land reported to the agent who appointed him that he had received and accepted an offer for the property, and requested that if the sale was approved, the principal should sign an enclosed deed, which omitted the name of the proposed grantee, and, upon return of the blank deed with the principal's signature, inserted his own name therein, and sent his check payable to the order of the agent, who credited the principal therewith, and there is nothing to show that the principal knew of the check, or of the purchase by the subagent, no ratification of the transaction is shown, and the principal may treat it as void, and recover the property from the subagent."

And in *Butler v. Agnew*, 9 Cal. App. 328, it was held such a violation of the fiduciary relation was "*violative of law, contrary to public policy, and unlawful.*"

The complainants cannot be held liable for the misuse of a power which they never created.

Certainly, Main *even as agent* could not do the following:

(1) He could not have misrepresented the value of the stock.

(2) He could not have misrepresented the condition of the stock.

(3) He could not have eliminated competition.

(4) He could not have dropped his own bid from 47% to 45%.

(5) He could not have formed a secret partnership to get possession of the stock for himself.

(6) He could not have had a "fake" auction.

(7) He could not have transferred the stock clandestinely to himself.

(8) He could not have then *instantly* made a secret profit of \$2000 by a transfer to his secret partnership.

(9) He could not then have conducted a sale of it for himself in the name of a third person to hide his interest and cover up his personal profits.

(10) He could not have turned the stock clandestinely over to himself for one-third of its value.

(11) He could not have withheld from these companies secret commissions on his own purchase.

(12) He could not have lowered and thus depreciated prices in the second inventory.

(13) He could not have mussed up the goods and made them look cheap for unlooked-for outside bidders.

(14) He could not have omitted merchandise from the second inventory.

(15) He could not have sent his principals a statement in which he concealed from them the fact of their

goods having been lumped off to himself at wholesale, and that he had charged them commissions on his own clandestine purchase and made no mention of all the preceding facts.

But Isaacs did all these!

It could thus be said of Main as was said in

Titus & Scudder v. Cairo & Fulton R. R. Co.,
46 N. J. L. Repts., 393, at 418 and 420:

“An agent whose powers and duties involve personal trust and confidence and the exercise of judgment and discretion, cannot, without authority from his principal, delegate to another the confidence and discretion reposed in him. Having by his own judgment and discretion determined what should be done, he may authorize another to perform the ministerial acts necessary to carry into effect the purposes of his employment, *but he cannot turn his principal's business over to the judgment and discretion of another, and bind the principal by the acts and conduct of the latter* * * *.

“Nor can the plaintiff hold his contract as against the company on the ground of a subsequent ratification of the unauthorized act of the agent; for knowledge by the principal of the unauthorized act of the agent is essential to a ratification, and as soon as the company or its officers were made aware of Guthrie's act, they promptly repudiated it.”

In order, of course, to be a “ratification” a full knowledge of all the facts and circumstances attending the transaction is essential.

“A cardinal principle of the law of agency makes complete knowledge on the part of the principal of the unauthorized act of his agent essential to the ratification of an act of that nature. A special

agent is without power to appoint and confer upon a subagent powers in excess of his own, or to ratify an unauthorized act."

Fargo v. Cravens, 9 S. D. 651.

X.

**HOWEVER, ISAACS—NOT MAIN—WAS THE AGENT OF THE
COMPLAINANTS.**

The allegations of the bill uncontroverted by the answer make this clear:

"That the complainants accepted defendant's said offer and delivered over their said stock of merchandise into his hands to do his best for them on the terms and conditions aforesaid. That the defendant after thus contracting with the complainants did actually take over into his exclusive and sole possession *and control* their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned above proceeded to sell the same in the said City of Seattle." (Tr. p. 4.)

And this allegation is confirmed by the answer, as follows:

"Admits that defendant had in his exclusive possession *and control* said Bridge stock merchandise." (Tr. p. 16.)

The rule of presumption of notice to them therefore does not apply.

And in this respect probably the clearest statement of the principle is by Judge Sanborn in

Pine Mountain Iron & Coal Co. v. Bailey, 94 Fed. 258, 261:

"As long as the agent is conducting negotiations for his principal with third parties, he may act on

his own behalf; but the moment he undertakes, without the knowledge of his principal, to conduct them with himself, his agency ceases, and the powers and liabilities of that relation no longer exist. *Voltz v. Blackmar*, 64 N. Y. 440, 446.

“In consonance with this principle of the law of agency, the rule that notice to the agent is notice to the principal has an exception as well established as the rule itself. It is that when the agent acts for himself, in his own interest, and adversely to his principal, in a given negotiation or transaction, neither notice to nor the knowledge of the agent can be lawfully imputed to the principal. *Surety Co. v. Pauly*, 170 U. S. 133, 156; *Frenkel v. Hudson*, 82 Ala. 158; *Waite v. City of Santa Cruz*, 89 Fed. 619, 630; *Barnes v. Gaslight Co.*, 27 N. J. Eq. 33, 37; *Winchester v. Railroad Co.*, 4 Md. 231, 241; *David Improved Wrought Iron Wagon Wheel Co. v. David Wrought Iron Wagon Co.*, 20 Fed. 699, 702; *Thomson Houston Electric Co. v. Capital Electric Co.*, 56 Fed. 849, 853; *Bank v. Cunningham*, 24 Pick. 270, 276; *Mechem, Ag.*, Sec. 723. The reason of the general rule is that it is the duty of the agent to communicate to his principal the facts relative to any transaction in which he acts on his behalf, and that the law presumes that he has discharged his duty. But when the nominal agent commences to act in his own interest, and adversely to his principal, the presumption no longer obtains that he will communicate to him facts which might prevent the consummation of the negotiation which he is conducting on his own behalf, and the counter presumption that he will conceal them arises. *As the reason for the rule no longer exists, the rule ceases to apply, and the exception prevails.*”

XI.

ON THE HYPOTHESIS OF MAIN'S AGENCY AND CONTINUING AUTHORITY EVERY PRESUMPTION IS AGAINST THE COMMUNICATION TO HIM BY ISAACS OF THE FACTS SURROUNDING THE BULK SALE BY ISAACS TO HIMSELF. THE PRESUMPTION IS IN FAVOR OF IGNORANCE RATHER THAN KNOWLEDGE BY MAIN. THE PRESUMPTION IS NOT THAT ISAACS COMMUNICATED THE FACTS TO MAIN, BUT THE PRESUMPTION IS TO THE CONTRARY.

The rule against the principal being charged with notice of facts known to his agent under the circumstances of the cause at bar, is stated as follows in *Clark & Skyles on Agency*, 2nd Ed., Sec. 485:

“The doctrine that a principal is chargeable with notice of facts known to his agent is based not only on the fiction of identity, but also on the fact that it is the duty of the agent to communicate his knowledge to his principal, and the presumption that he has performed his duty.

“No such presumption can arise, however, where the agent is dealing with the principal in his own interest or where he is acting in collusion to defraud his principal, or where, for any other reason, his interest is adverse to that of his principal, so that it is to his own interest not to communicate the knowledge to the principal. *In such a case the general rule that notice to an agent is notice to his principal does not apply.*”

Whittle v. Vanderbilt Co., 83 Fed. 48.

Louisville Trust Co. v. Louisville Co., 75 Fed. 433.

Lawson v. Beard, 94 Fed. 30;

Western Mortgage Co. v. Ganzer, 63 Fed. 647;

Hudson v. Randolph, 66 Fed. 216;

Bank v. Austin, 118 Fed. 798.

Mr. Mechem in his work on Agency in referring to the general rule, says:

“The presumption, however, will not prevail where it is certainly to be expected that the agent will not perform this duty, as where the agent, though nominally acting as such, is in reality acting in his own or another’s interest, and adversely to that of his principal.” (Sec. 723.)

Judge Devens in the opinion in

Innerarity v. Merchants National Bank, 139 Mass. 332,

clearly states the exception as follows:

“While the knowledge of an agent is ordinarily to be imputed to the principal it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the facts in controversy, *as where the communication of such facts would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating.*”

In speaking of the general rule in

Frankel v. Hudson, 82 Ala. 158,

Justice Somerville says:

“It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons:

“First: that he will very likely, in such case, act for himself, rather than for his principal; and

“Secondly: he will not be likely to communicate to the principal a fact which he is interested in concealing.

“It would be both unjust and unwarrantable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject.”

Said *Justice Maynard* in a New York case:

“It is an old dictum from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest.”

Manhattan Life Ins. Co. v. 42nd St. Ferry Co.,
139 N. Y. 146.

XII.

RULE OF OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM.

Your Honors' continuing attention is respectfully urged to the fact that this defendant, a trustee, refused to give the complainants, his *cestui que trust*, an accounting, before this cause was begun, as Mr. Horne testified; and his evidence remains uncontradicted upon the record. Also that this trustee fought off by technical delays this accounting for a year; and that the present trumped up accounting furnished now is not a voluntary one, but a forced one, wrung from him by the Court. In such a case the rule is very plain as instanced in *Myers v. Myers*, 16 Am. Dec. 648-58, the Court holding that a trustee's refusing to account furnishes a good reason for adopting against him the most

rigid rule of calculation, in the following express language:

“His refusing to account, however, furnishes a very good reason why the Court should adopt the most rigid rule of calculation which the law affords in behalf of the *cestui que trust* as a substitute for such omission.”

It will be seen from the facts referred to as disclosed by the evidence, as your Honors have unquestionably concluded from your individual perusal of the record, that this trustee not only transferred the trust fund to himself for a gross inadequacy of consideration, but also committed toward these complainants as his *cestui que trust* various torts, such as *misrepresentation*, *misappropriation*, *concealment*, and *actual fraud*.

In such case the rule in equity is of course of the strictest interpretation and firmly interposes against him the equitable doctrine of “*omnia praesumuntur contra spoliatores*” for this rule in all its rigor is for wrongdoers, for those who have been guilty of a willful disregard of duty.

The Court will further have observed with interest Isaacs’ careful destruction or non-production of the adding machine totals, the cash register totals, and the salesmen’s indexes by which alone the equally carefully *preserved* famous ten thousand sales slips could have been checked up and their integrity determined. In this regard I refer your Honors with respectful insistence to the language of Justice Dodge and the case in which it was uttered;

Lessel v. Zillmer, 105 Wis. 334, at 339:

“The principle is elementary that upon him who has the exclusive knowledge rests the burden of proof, and especially so in reference to goods held in a fiduciary capacity. The defendant not only failed to prove how or at what prices he had disposed of a considerable share of the property, but admitted that he had destroyed the record evidence thereof. Application of the rule *omnia praesumuntur contra spoliatorem* might well have held defendant to account for these goods at their inventory value.

“Other facts, such as diversion of selected goods, of inventory value of \$7200 into his own private business, where presumably they produced full trade prices, though he accounted for them at only \$2400, seem to confirm the conclusion that defendant will have realized a substantial profit to himself after carrying out his promise to the plaintiff.”

I here lay special emphasis on those words—“*application of the rule omnia praesumuntur contra spoliatorem* MIGHT WELL HAVE HELD DEFENDANT TO ACCOUNT FOR THESE GOODS AT THEIR INVENTORY VALUE” as exactly paralleling the contention of these complainants in the cause at bar.

Assignments of Error, I, II, and VI (Tr. pp. 170-1).

This trustee's non-production of his wife—who was his “cashier”, of the mysterious “Mr. Bass” who “kept” the purported “cash book”; his non-production of the cash register totals, the adding machine totals, and the salesmen's indexes, must be held against him as the presumption is that if produced they would have been unfavorable to him.

“When one willfully suppresses testimony, the presumption is, that such testimony, if produced, would be adverse to him.”

People v. Hurley, 57 Cal. 146.

It was also the duty of this trustee to have kept accurate and intelligible proper books of accounts of all the transactions of this trust fund consisting of the merchandise of these complainants. The fact that he failed to do this furnishes a strong inference against him, and the maxim “*omnia praesumuntur contra spoliatores*” should therefore be applied against him by your Honors as Chancellors in this cause.

Dimond v. Henderson, 47 Wis. 172, 175-6.

The words of Judge Cole in deciding that case apply with particular significance to the cause at bar, as follows:

“The books of the firm, which were introduced upon the trial, were kept in such a confused and unintelligible manner that it is impossible to get at the real state of the accounts. The business was intrusted entirely to the management *and control* of Henderson. He was paid a salary for keeping the books and transacting the business in a proper manner, and if he kept the books so imperfectly that the true state of the accounts and the transactions of the firm cannot be ascertained from them, it is but fair that every presumption to his disadvantage should be adopted. It is a case where the maxim, *omnia praesumuntur contra spoliatores*, should be applied, for it is wholly his fault that the means of ascertaining the truth are not furnished by the account books themselves.”

The refusal of the trial court to so hold was clear error.

Assignments of Error XXXV and XXXVI (Tr. pp. 204-5).

XIII.

THE BURDEN OF PROOF—FIRST SUBDIVISION.

“THE DISTRICT COURT ERRED IN HOLDING AND CONCLUDING THAT THE BURDEN WAS NOT UPON THE DEFENDANT AS THE TRUSTEE OF THE COMPLAINANTS TO RENDER THEM A PROPER ACCOUNTING.”

Assignment of Error III (Tr. p. 170).

- (A) The burden not only of proving affirmatively the agency and powers claimed by the defendant to have constituted the authority of Main, but of the absolute fairness and square dealing of himself as trustee in his every transaction relating to this trust fund, and that the transaction out of which his title at the sale in bulk arose was fair, open and well understood, rests squarely upon the shoulders of this defendant.

“In an action in equity against a fiduciary for an accounting based on improper dealings with property held in such capacity, the burden of disclosure rests on the fiduciary, and the plaintiff is relieved from the necessity of specifying and proving in detail the various breaches of trust.”

Somervail v. McDermott, 116 Wis. 505.

“The *uberrima fides* of the fiduciary relation is the standard of fidelity exacted from a trustee. When such fiduciary relations exist, and a condition of superiority is held by one over the other, in every transaction between them by which the superior party obtains a possible benefit, *Equity raises a presumption against its validity, and casts upon*

that party the burden of proving affirmatively his compliance with equitable requisites, and of thereby overcoming the presumption."

Pomeroy Eq. Jur. Sec. 956,

Butler v. Prentiss, 158 N. Y. 49.

"In the proceedings before the master the burden was upon the accountants to justify and vouch the accounts which they had rendered."

Gutterson v. Lebanon Iron Co., 151 Fed. 72, 74.

"An agent who takes title from his principal of property of which he has charge from his principal *is bound to show affirmatively*, in order to maintain his title, if it is assailed, that the transaction out of which his title arose, was fair, open, and well understood.

"In such cases *fraud will be presumed*, and the agent, in order to keep what he has got, *must show affirmatively* that he has not abused the confidence which his principal reposed in him."

Le Gendre v. Byrnes, 44 N. J. Eq. 372.

"When the agent empowered to sell himself purchases without full knowledge of all the facts by the principal, fraud in fact need not be alleged or shown to avoid the transaction. There is no rule more thoroughly settled than this one, and it requires only the fact of such a purchase to have been made to avoid the sale. No fraud in fact need be shown by the *cestui que trust*, and no excuse will be heard from the trustee to justify the act. The fact established and the result inevitably follows. Such purchase is *prima facie* voidable by the *cestui que trust* or principal, and it rests with the trustee or agent seeking to sustain it to establish the facts which take it out of the general rule and make it valid."

Tilleny v. Wolberton, 46 Minn. 256-8.

Mr. Mechem, in his work on Agency, speaking of such a transaction, says that

“a Court of Equity, upon grounds of public policy, will subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged a presumption of its invalidity arises and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal.”

Mechem on Agency, Sec. 466.

In *Underhill on Trusts and Trustees* (Am. Ed.), at page 322, the author says that a transaction of this kind can be upheld only when the trustee “affirmatively and conclusively” shows “*That he and the beneficiaries were at arm’s length and that no confidence was reposed in him.*”

The rule with regard to purchases from a beneficiary by a trustee is there stated as follows:

“A trustee may purchase, or lease, or accept a mortgage of trust property direct from the beneficiaries; but in that case, if the transaction be impeached, it is incumbent on the trustee to prove affirmatively and conclusively:

“a. That he and the beneficiaries were at arm’s length, and that no confidence was reposed in him;

“b. That the transaction was for the advantage of the beneficiaries; and

“c. That full information was given to the beneficiaries of the value of the property, of the nature of their interest therein, and of the circumstances of the transaction.”

In *Kerr on Fraud and Mistake*, Third (English) Ed., 135, the author says:

“The burden of proof lies in all cases upon the party who fills the position of *active confidence* to show that the transaction has been fair.”

Not only is the trustee bound by the duty so imposed to *communicate* to the *cestui que trust* the full effect, nature and consequences of his act before it is executed, but the law exacts also that the trustee shall see to it that the beneficiary *comprehends* the full force and affect of his acts. Nor do the obligations of a trustee who is acting for one whose relation is fiduciary stop there. As I have said, the trustee cannot sit still before the Chancellor and say, “Prove that I did not do my duty.” He is required by the law to come forward and make an affirmative showing; and the transaction will be set aside unless he shall present clear and unmistakable proof.

(B) Defendant confesses he cannot meet this burden.

I propose now to point out that, instead of coming forward at once and courageously meeting the burden of proof, this trustee virtually confesses that he cannot meet it. This confession is to be found in the character of his efforts both with the facts and the law to convince

your Honors that the burden has passed from his shoulders. His theories and the arguments advanced in their support bear the desperate earmark of lost hope.

Here is what he does:

1. He makes the ridiculous claim in the face of the actual proof upon the record, that all his transactions with the trust fund have been fair and above-board; and that he fairly sold the best of the complainants' merchandise for them 20% *below* the Bridge cost prices in the first inventory, and the worst of it for himself 10% *above* the same Bridge cost prices in the first inventory.

2. He then while denying his own frauds and wrongdoing advances the impossible argument that his frauds and wrongdoing were known to George C. Main.

3. He then fathers the absurd claim that though on the day after the retail sale began, the same George C. Main, on September 8, 1913, sent the complainant companies his final report on the loss and bill for services, and was paid off, that nevertheless Main continued in the employment of these complainants.

4. He stands for the dishonest contention that his depreciation of the second inventory to the amount of \$6500 or more must have been known to Main (though Main directly denies it) and that these complainants are therefore estopped in equity from discovery of his frauds or the amount of the embezzlement.

5. And he then tries to hide the whole issue when cornered by dodging behind those immemorial bulwarks

of dishonesty, Stated Account, Laches and the Statute of Limitations, which always have been "like the shadow of a great rock in a weary land" to the wrongdoer to shield him from the burning gaze of the Chancellor!

Isaacs, instead of acknowledging squarely from the first that the burden of proof is resting on his shoulders and meeting it, thus resorts to quibbles and ridiculous and flimsy pretexts so as to ward that burden away; and while doing all this claims the burden does not rest upon him at all to establish his own contentions.

I have pointed out activities and acts as well as omissions in the course of the transaction which does not leave the question open to doubt. It is the inexorable conclusion of the law that there was an abuse of the relation of trust and confidence on the part of this trustee. Under the facts shown by the record equity presumes the existence of fraud and casts the burden upon this trustee to prove affirmatively that the transaction by which he profited was all that it should have been. Above all things it is essential to the integrity of the transaction that it be absolutely free from the slightest suspicion of misconduct upon the part of this trustee. The very rule which so readily places the burden of proof upon him, is in itself a ringing declaration that no star chamber secrets shall attend such a transaction. The burden of proof upon this point rests squarely on Isaacs and he has not been able to escape it by any of his several significantly desperate efforts.

Equity is concerned with the question: *Have the obligations concerned with the burden of proof been met? Are Isaacs' explanations adequate to remove from the mind of the Chancellor the suspicion which the law put upon him?* And finally, Equity asks: *Has he shown that he has done all of the affirmative things which the rules of equity inexorably demand of a trustee?*

Instead of meeting this burden which the law thus cast upon him, what have we got? Is there any adequate answer to the array of facts and circumstances assembled by the complainants upon this record?

It is enough for us that the burden being upon him to prove by clear and satisfactory evidence his fair dealing with our property, this trustee has left his case with the burden not only unchanged but with the preponderance of evidence the other way.

XIV.

THE BURDEN OF PROOF—SECOND SUBDIVISION.

“(A) The district court erred in its decision in holding and concluding that the statement rendered by this trustee as set forth in the bill of complaint which was forwarded to the companies with his purported ‘net balance’ of \$1049 became an account stated between the complainants and himself as their trustee.

“The District Court erred in its citation and rule of law on this point to the effect that the burden of proof rested on the complainants; the cases cited being where the fraud or error was apparent upon the face of the account.

“In the present cause Isaacs’ statement to the complainants does not reveal his sale in bulk secretly to himself, nor his charge of commissions on such sale; and his fraud upon his fiduciary is not apparent from the closest scrutiny of the account.”

Assignment of Error XLI (Tr. p. 209).

The lower Court, however, in its opinion lays down the following astounding rule in equity as to an account which does not disclose upon its face matters which are the subject of later enquiry and of which the most careful perusal gives no inkling of matters undisclosed and intentionally concealed in its totals:

“The second proposition (burden on defendant) advanced by the plaintiffs is, of course, sound. But here an account was rendered, and acquiesced in for more than two years without question or protest. Under such circumstances the rule is changed and the burden is shifted to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof.

Eichel v. Sawyer, 44 Fed. 853;

Porter v. Price, 80 Fed. 656;

Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150;

Allen West Commission Co. v. Patello, 90 Fed. 629.”

(Tr. pp. 37, 38.)

Each of the foregoing citations was a suit *at law*, actions for commissions or on promissory notes, and their incongruity with reference to the facts of the present equity suit will easily be seen by taking each up *seriatim*:

In each the issue of “account stated” was raised by *creditor against debtor*.

Eichel v. Sawyer, 44 Fed. 845.

This was an action at law for conversion and damages for \$220,000 by consignors against their factor, who answered, denying conversion, and setting up a counterclaim for commissions and various charges on the merchandise, in all an indebtedness to them of \$186,541 as shown by accounts rendered repeatedly over a period of five years.

The Court naturally held the burden was upon the plaintiff to establish conversion and held where they had received statements at various times over the period and did not in a reasonable time thereafter point out errors or claim corrections, the law treated their silence as an admission of their correctness—with which abstract general rule I find no fault.

Potter v. Price, 80 Fed. 657.

This was an action at law upon three promissory notes given to a factor in payment of an account rendered by him for commissions on various sales. The opinion is based upon the following principle therein stated (p. 657):

“But a man cannot be allowed to lay a rendered account aside, and afterwards, merely upon saying that he did so trusting to the honesty and accuracy of the other party, be allowed to attack it *in respect to matters apparent upon a reasonable examination of the items as stated on the face of the account.*”

And the Court naturally held the account to be an account stated which could not be opened because an

item of interest which went into it was unknown to the party to be charged though clearly apparent upon the face of the account.

Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150.

This was an action at law to recover \$4269.66 for commissions on various merchandise. The Court says p. 154):

“Fisher was examined as a witness upon the trial, and did not, in any way, contradict the testimony, or say anything which would controvert the inference fairly deducible from the correspondence and testimony *that he was fully informed as to everything connected with their transactions.* We must assume, therefore, that when the account was stated and submitted to him on June 10, 1893, *he had all the information necessary to an understanding of its correctness.*”

The Court then proceeds (p. 156):

“This settlement is binding upon the parties as to all reciprocal demands then existing; certainly as to all known demands. What would be its effect as to *claims not then discovered* need not be considered, as none such appear. * * * *All the information relating to them was in the possession of the parties at the time the settlement was made.*”

Allen West Commission Co. v. Patello, 90 Fed. 628.

This was an action at law to recover \$2732.50 for commissions on 2186 bales of cotton. The Court says (p. 630):

“The letters offered in evidence show conclusively that the defendants were not, and could not have been, ignorant of the terms of the contract as to cotton not shipped, upon which the plaintiff was acting; and good faith required that they should properly notify the plaintiff of the fact if they did not consent to its terms.”

The Court then proceeds (p. 632):

“The recovery sought was for commissions on cotton not shipped; the accounts furnished to the defendants *so stated*; and in addition to the charges therefor, *set out in the accounts*, the plaintiff repeatedly advised the defendants by letter of the terms of the agreement, and that these items for commissions not shipped would be charged, to which no objection was made by the defendants for more than two years after the account was opened.”

The Court naturally held the account to be a stated account “which could only be set aside by proof of fraud or mistake”.

Now, the Cause at Bar.

The action at bar is very different. It is based upon matters of *equitable* cognizance. This is a suit in equity by the *cestui que trust* against their trustee for an accounting.

The issue of “account stated” is here raised by *debtor against creditor*.

The statement claimed to be a “stated account” is as follows:

"Statement		Salvage A. Bridge & Co.
Clothing, furnishings, shoes, net sales		\$28,901.92
Expense:		
Rent	\$920.00	
Light	66.88	
Advertising	1,204.21	
Clerk hire	1,655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling at		
20% on \$28,901.92	5,780.38	
Advanced as guarantee	18,100.00	27,852.11
Net Proceeds		\$1,049.81"

Can it be said the sale in bulk by this trustee and that he himself was the purchaser of their merchandise or that he had held out commissions on his own purchase, or that his depreciation of the second inventory or that the retail receipts were depreciated and sales slips missing, or that his receipts on his secret transfer to himself of their merchandise were \$15,466 more than he paid them for it—"are set out in the account"; or that they are "*matters apparent upon a reasonable examination of the items as stated on the face of the account*"; or that when this statement was rendered them these complainants "*had all the information necessary to an understanding of its correctness*", or that "*all the information relating to them was in the possession of the parties at the time the settlement was made?*"

Hardly!

I insist, too, that these propositions are so obvious, and that these authorities, taken from opposing counsel's brief in the trial Court, are so plainly not cited

with any regard to their applicability, that your Honors have further intrinsic evidence that this trustee is conscious of their weakness. It would hardly seem as though counsel and the trial Court had consciously read their own authorities.

(B) The Correct Rule.

Issue of "Account Stated" cannot be raised by debtor against his creditor.

The correct rule with reference to matters not apparent upon the face of the account, is laid down by Judge McPherson in a later volume, and is found in the words of the head note, as follows:

"The rule that the failure to object to the correctness of an account rendered within a reasonable time renders it an account stated applies only to accounts *rendered by the creditor to his debtor, as to the correctness of which the latter has knowledge, and has no application to statements of account rendered by one who is bound by contract to account for sums collected in respect to which he has knowledge, but the creditor has not, and the failure of the creditor to object because of omissions in the statement does not preclude him from recovering the items so omitted.*"

Vanuxen v. New York Life Ins. Co., 122 Fed. 106.

This decision has never been reversed and stands today the rule in all our Federal Courts, and is obviously the rule on this appeal.

Justice McPherson after referring to the general rule therein, says:

"But is there any reason, either in law or justice, for the application of this rule to a case such as

that of the defendant which is practically that of an accounting trustee?

“The reason on which the rule rests is not present here, for the plaintiff had no means within his knowledge of verifying the account, and had only before him such items as the defendant chose to submit. His failure, therefore, to make any specific objection, is far more fairly referable to his want of knowledge than to any presumption of an agreement or an assent to the correctness of the account.

“But is there any such rule as is contended for by the defendant? Is there any rule which will permit a debtor to limit his liability by simply omitting to charge himself with certain items in an extended and complicated account rendered to his creditor, without means of knowledge? Surely a creditor cannot be held to such vigilance in asserting his right, especially when the debtor has the means of information exclusively in his own possession, and gives only those items on which he admits his liability; no reference being made to those which may be disputed. Does not the rule that a debtor must seek his creditor rather put the obligation on the defendant to duly notify plaintiff in the outset that such items are refused, and thus raise the question?

“The rule, rather, is that, when an account rendered is not objected to within a reasonable time, the failure to object will be regarded as an admission of its correctness by the party charged.

“But in this instance such a rule is invoked by the party charged—by the party indebted—as against the plaintiff seeking to recover for monies which the defendant has received, and for which it has failed to account.”

The Court directed judgment to be entered for the plaintiff.

The Federal rule is evidently becoming the rule also of the States. In a very late case in the 1916 reports

Employers Liability Assurance Corporation Ltd.
v. Kelly-Atkinson Corporation Co., 195 Ill.
App. 620,

the wording of the able opinion by Judge Barnes would seem to have been with foreknowledge of the issues in the present cause. He says:

“Appellee finds analogy to an account stated in the claim that plaintiff acquiesced in the correctness of defendant’s report because it made no objection thereto and rendered its bill thereon, but we think there can be no application of the rule of a stated account to this state of facts——

“There was no acquiescence by plaintiff in the correctness of defendant’s report on which the bills were rendered. The debtor had exclusive knowledge of the facts on which the bills were rendered, and the creditor had no independent means of ascertaining their correctness nor grounds for objecting thereto.

“In *Vanuxem v. New York Life Ins. Co.*, 122 Fed. 107, it was held that the general rule as to the admission of items of an account from failure to object thereto was not applicable where the creditor had no means within his knowledge of verifying the amount and had only before him such items as the debtor chose to submit. Attention was also called in that case to the anomaly that exists here, *of the debtor instead of the creditor* invoking the rule, the court adopting the language of counsel to the effect that the admission of the correctness of an account rendered from failure to object thereto and the acquiescence in an account received from retention of it without objection *must be the admission or acquiescence of the party charged or indebted.*

“Reaching the conclusion that there was no stated account, we need not discuss appellant’s contention for which there is ample authority, that *the doctrine of an account stated does not apply*

where the transaction involves fraud, concealment or misrepresentation.

“Appellee also urges that as plaintiff had the right to demand a view and examination of defendant’s books and to compel an examination if refused, and has waited over five years before attempting to assert its rights, it was not only guilty of laches but had induced defendant to alter its position and was thereby estopped from claiming that the accounts made and accounts as settled were incorrect. The only change in defendant’s position suggested is the destruction or loss of its books, which can hardly be ascribed to anything plaintiff did. However, when the case was here on appeal before, we said that *the evidence disclosed nothing until just before the suit that led appellant to question the accuracy of such report or to put it on enquiry, and that it would be a strange doctrine to hold that plaintiff was guilty of lack of diligence because it did not assume or suspect fraud where the nature of the business relation was such as to invite its confidence in defendant’s report.*”

These decisions hold that the issue of “account stated” cannot be raised by debtor against creditor.

Isaacs, as trustee, when he rendered his statement, was the debtor of these companies, and unquestionably under the decisions therefore cannot raise the issue of “account stated” against them as his creditor.

Hence the trial Court in holding Isaacs’ statement to have become an “account stated” and that the burden of proof therefore had shifted to the complainants, committed manifest error.

In

State v. Edwards, 94 Minn. 225, at 229,

the Supreme Court of Minnesota decided a similar case wherein the agent had rendered a like report to his principals of a sale of their merchandise which carefully concealed the fact of himself being the purchaser by making no mention of it. The Court said, speaking through Justice Lewis:

“The record conclusively shows that on the following day the car of flax, without being unloaded, was disposed of by defendants at an advance of one-half cent a bushel. Under the law of agency such sale inured to the benefit of defendant’s principal, and the attempted sale to themselves, as testified to by their agent, was, *prima facie*, a nullity. We cannot accept as applicable to this case the proposition that, if the shipper made no protest after receiving the report of the alleged sale and the proceeds thereof, he thereby accepted and ratified the sale. On the other hand, it was the duty of the defendant to clearly show that the shipper not only knew that the sale was made to themselves, *upon which point the report of sale is silent*, but that he also knew that subsequently the defendant sold the flax at an advanced price, and, being possessed of all these facts, he accepted the proceeds of the sale to defendant as final, and waived his right to profits on account of the subsequent sale. *In this respect the evidence entirely fails.*”

In this connection I respectfully also refer your Honors to Assignment of Error XLII (Tr. p. 209), as follows:

“The District Court erred in its decision in holding and concluding that the complainants ‘acquiesced for more than two years in their trustee’s account without question or protest.’

“The evidence shows his fiduciaries had no knowledge of the frauds of their trustee nor anything to put them on enquiry until the revelations in the Seynei case against Isaacs in the Federal Court. Their action was then immediate.”

XV.

“The District Court erred throughout the trial and in its decision in holding and concluding and refusing to consider evidence of actual fraud by the defendant and then in its opinion upon which the final decree dismissing the complaint was entered stating the complainants had not fully and clearly established such fraud.”

Assignment of Error VIII (Tr. p. 172).

With respect also to the said paragraph of the Court’s opinion covering stated account, I here call your Honors’ attention to the words,

“and the burden is shifted to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof”
(Tr. pp. 37, 38);

and then to the following proceedings upon the trial whereby the same Court REFUSED TO ALLOW *“the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof”*. The witness testifying is Mr. Jeremy on direct examination. I quote the record (Tr. p. 78):

“I was present when the second inventory was made. It was made on a Sunday right after the first sale, the insurance sale, was closed the day before. The sale in bulk occurred upon the next day, Monday. In the making of this second inventory we made the stock look as cheap as possible for the bidders--the outside bidders; made it look as cheap

as we could. *This was by the defendant's direction.*

"Mr. SCHLESSINGER. I object to that, if your Honor please, on the ground it is not within the issues involved in this controversy. There is no claim here that the company was defrauded by reason of any act on the part of this defendant in the matter suggested by counsel's question.

"The COURT. *The objection to any testimony tending to show actual fraud will be sustained.*

"Mr. OLNEY. Exception."

If there was no other assignment in the case a prompt reversal should be had upon this alone.

XVI.

THIS TRUSTEE'S PLEA OF THE STATUTE OF LIMITATIONS.

"As the case before us is a suit in equity, and as the bill contains a distinct allegation that the defendant kept secret and concealed from the parties interested the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity—

"They (statutes of limitation) were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. *To hold that by concealing a fraud, or by committing a fraud in a manner that concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to protect fraud the means by which it is made successful and secure.*"

Mr. Justice Miller, in deciding

Bailey v. Glover, 88 U. S. 342, at 348 and 349:

“The leading object of the statute (limitations) was certainly to prevent fraudulent and unjust claims from being brought forward after such a lapse of time that evidence might no longer be within reach of the other party by which they could be repelled. It was not intended to deprive a party of redress when by the act of the defendant himself he has been deprived of the opportunity of availing himself of it. To give it such a construction would make it a means of encouraging, rather than preventing, frauds. It is a general principle that no one will be permitted in a court of justice to claim protection by means alone of his own fraud. If the plaintiff has had knowledge of it, the statute of course, runs against him. *But if he has been kept in ignorance of his rights by the fraudulent contrivance of the defendant, does not the fraud of the latter estop him from claiming that there has been a delay in the prosecuting of the suit, which his own actions have prevented from being brought at an earlier day?*”

Munson v. Hallowell, 26 Tex. 475, at 484; 84 Am. Dec. 582.

“The equity jurisdiction of the courts of the United States is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.”

Kirby v. Lake Shore Railroad, 120 U. S., at 138;
Bogert v. Southern Pacific Co., 244 Fed., at 66;
 U. S. Rev. St., Sec. 721.

The defendant here pleads the statute only as to the sale in bulk (Tr. pp. 28 and 31).

Upon the trial in the lower court this trustee and his confreres appeared as total strangers to equity in that all their attenuated arguments and defenses were those commonly used by debtors in actions at law, totally ignoring the rule that in equity no length of time will run to protect or screen fraud. The learned counsel in the trial Court devoted his activities almost exclusively, as probably he will before your Honors, to the statute of limitations to save his client from the just decree of a court of equity; in urging the filing upon the trial of the amendment to the bill relating to the sale in bulk did not relate back to the time of the commencement of the action, and that whereas three years had elapsed from the time of that sale and the date of the trial that therefore the local Code of Civil Procedure of California relating to limitations, applied. But counsel unfortunately overlooks the fact that even upon the hypothesis of the applicability of the California codes the four year statute in vogue in California in actions for an accounting had not yet run, even at the trial date, against these complainants. Isaacs transferred the merchandise secretly to himself September 29, 1913; the present action in equity for an accounting was begun February 23, 1916, *nineteen* months before the statute of limitations, under the most favorable construction for the defendant, could be said to have expired. The date of the trial was January 31, 1917, which was still some eight months before the statute of limitation expired.

- (a) In California the limitation in actions for an accounting is four years but does not run while the breach of trust is concealed from the principal by his agent.

Section 343, California Code of Civil Procedure, is as follows:

“Actions for relief not hereinbefore provided for. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.”

As this defendant takes refuge behind the California law, I beg leave to cite to your Honors a California case which completely disposes of his contention—a case where the principal sued for an accounting from his agent—where the court held that an averment and finding that a portion of the property was misappropriated by the defendant to his own uses did not change the cause of action; and I quote further from the head-note:

“STATUTE OF LIMITATIONS — PLEADING — EXPRESS TRUST—CONCEALED BREACH.—The statute of limitation applicable to an accounting between an agent and the principal is Section 343 of the Code of Civil Procedure, and cannot be invoked if not pleaded; nor could the statute begin to run, the relation being one of express trust, where no knowledge of a repudiation of the trust relation was brought home to the knowledge of the principal, but the breach of trust was concealed from him.”

Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 229;

the above citing an earlier case by the Supreme Court of California in the following language:

“In San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, it is said:

‘The statute of limitations cannot be successfully invoked. Reynolds was acting in a fiduciary capacity. Such of his acts as resulted in loss to the corporation were concealed breaches of trust. The statute of limitations would not begin to run in his favor, *so as to enable him to escape the results of an accounting*, until after knowledge by his principal of his derelictions. In this case the accounting was promptly demanded after discovery.’

And likewise it may be said here that the complainants acted speedily and without unnecessary delay after discovery.

- (b) Not applicable between trustee and *cestui que trust* until trustee assumes adverse position with notice to the *cestui que trust*: before that the statute does not even begin to run.

In *2 Perry on Trusts*, Sec. 863, the rule is stated as follows:

“As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application and no length of time is a bar. Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui* * * * The trustee must clearly repudiate the trust and assume an adverse position, with notice to the *cestui*, before the statute can begin to run.”

But the principle is too well established to need further citation of authorities.

Yet our trustee advances this shamefaced plea that notwithstanding his direct frauds and shortcomings evidenced upon the record, and his undenied violation of

his position of trust and confidence, he is immune in equity because his confidential relation ended with the payment of his purported balance and statement to these complainants, and the statute of limitations has hastened to his aid! But how about this confidential relation? Did it indeed run down like a clock as soon as he had clandestinely transferred to himself the main portion of the trust fund? The learned trial Court says that it did and that *the statute of limitations had run on it by sundown on September 29, 1916, or thereabouts—seven months AFTER the present action was begun!*

The District Court must have held the *three year* local state statute of California applied, for it says:

“It would seem idle, therefore, for the complainants to claim that they can now set this sale aside after the lapse of more than *three years*” (Tr. p. 41).

Thus the trial Court entirely overlooked the fact that this cause was filed only a little over *two* years from the date of the sale in bulk, and within *ten days* of the complainants’ discovery of the misconduct of their trustee.

We cite this as clear error under our Assignment XLIII (Tr. p. 210).

- (c) **The complainants’ amendment of their bill upon the trial did not change the cause of action.**

Opposing counsel overlooked the fact that this is a Federal equity suit and that by new Equity Rule 20

“the plaintiff may strengthen his case by a better statement of the nature of his claim,

or a further and better statement of particulars of any matters stated in any pleading, upon such terms as the Court may order”.

That the amendment of the bill upon the trial by such permission of the Court related back to the time of the commencement of the action is too axiomatic to discuss before your Honors as Chancellors. Its few lines, filed at the suggestion of the Court, were not a supplemental bill nor an amended bill, but a simple amendment inserted in the body of the existing bill, as its own words directed—“after the words ‘said sale’ on line eight of page five thereof”. There is but one cause of action pleaded and that is to require D. Isaacs to account for the property of the complainants which came into his hands, from the beginning to the end; and that accounting opens up every angle of this trustee’s acts to the broadest degree under the rulings of a court of equity as to what he shall be charged with upon the account, and if fraud, either through operation of law or principle of equity, appears, his acts are vitiated and he is charged accordingly.

That a complaint asks that a transaction be set aside does not make it demurrable for improper joinder of causes where such relief is necessary in order to entitle complainants to a recovery.

In

Smith v. Irwin, 108 App. Div. 218,

the complaint prayed for an accounting for assets obtained by false representations, and, further, that the transaction by which such assets were conveyed be set

aside. Justice Ingraham delivered the opinion of the Court, saying:

“As I read this complaint, there is but one cause of action, and that is to require the surviving partner to account for the property of the firm which came into his hands; and the ground of demurrer that several causes of action are improperly united is, therefore, not well taken.”

“An amended complaint merely amplifying the allegations of the original and praying certain steps within the equity powers of the Court necessary to enable it to grant the same relief prayed for in the former pleading, is not objectionable as stating a different cause of action.

“The inherent difference between law and equity cannot be ignored in allowing amendments to complaints. The prayer attached to a complaint is no part of a cause of action and cannot control a cause of action clearly alleged.”

Northside Loan Soc. v. Nokelski, 106 N. W. 1097.

“The relief within the power of equity jurisdiction to afford is limited only by the wrongs to be redressed.”

Harrigan v. Gilchrist, 121 Wis. 127, 235;

and

“No time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it.”

Kelly v. Boettcher, 85 Fed. 56.

- (d) Equity will not aid an agent who has assumed a position with reference to the business which is antagonistic to his principal.

A precisely similar situation and technical defense

of amendment upon the trial changing the cause of action arose in the case of

Moore v. Petty, 135 Fed. 668,

where the circumstance relating to amendment was very similar to the case at bar. There the petition as first filed proceeded upon the theory that the first sale by defendants was a sham, and was really to themselves, though made colorably to another for the purpose of deceiving the executors and defrauding the estate; that after accomplishing the deception they sold the land to other parties at a substantial advance; and that consequently the estate was damaged in that amount. After the issues were joined and the cause came on for trial, the executors, with the permission of the Court but against the objections of the defendants, amended their petition by alleging that the defendants, while acting as their agents, sold the land for the increased price, and received and still retained the same. The Court held the allowance of the amendment was within the discretion of the trial Court. The defendants did not suggest to the Court that they were taken by surprise, and request additional time to meet the interpolated amendment, but claimed, as here, it changed the proceeding. Judge Hook held it did not, and in the course of the opinion said:

“It will not do to draw lines too nicely to aid agents who have, during the existence of their relation of trust and confidence, assumed a position with reference to the business in their charge which is antagonistic to their principals.”

XVII.

LACHES.

FIRST SUBDIVISION.

“The District Court erred in its decision in holding and concluding that the complainants acquiesced for more than two years in their trustee’s account without question or protest. The evidence shows his fiduciaries had no knowledge of the frauds of their trustee nor anything to put them on enquiry until the revelations in the Seynei suit in the Federal Court. Their action was then immediate.”

Assignment of Error XLII (Tr. p. 209).

“The District Court erred in its decision upon the wrong hypothesis of acquiescence in imputing laches to the complainants, and holding that laches short of the statute of limitations could be set up by an agent, the statute of limitations in actions for an accounting in California being four years, and the present action having been begun nineteen months before the statute expired.”

Assignment of Error XLIII (Tr. pp. 209-10).

(a) The California rule.

Here again even the California cases balk the defendant. In *Cahill v. Superior Court*, 145 Cal. 47; it was held that before laches can be maintained as a defense there must appear in addition to mere lapse of time, some circumstances from which the defendant, or some other person, will be prejudiced.

And in *Cook v. Ceas*, 147 Cal. 614, 618, the Court said:

“The effect of lapse of time upon a cause of action, where the delay is unproductive of and unaccompanied by any hardship or injustice to the other party, is determined by the provisions of the statute of limitations.”

Time has wrought no obstacle or hardship upon this trustee. Isaacs does not come into Court empty-handed but claims to produce all the data made at the time of the sale—10,000 sales slips and his “cash book”.

And in *Estudillo v. Security Loan Co.*, 149 Cal. 557, the same Court ruled that where the period prescribed by the statute of limitations has not expired, the right to maintain the action is governed not by the doctrine of laches but by the statute of limitations.

Though the local statute (if any) governing the cause at bar as pointed out in the *Allsopp v. Hendy Iron Works* case, is Section 343 of the California Code of Civil Procedure prescribing the four-year limitation, the present action as I have shown, was commenced within three years. There has been no laches; and in view of the confidential relation of the parties, the defense of laches cannot be interposed in this case.

Having at the time the greatest confidence in Isaacs the complainants were not bound to question his motives or investigate his acts. There were no circumstances attending the transaction calculated to arouse their suspicion or cause them to question the statement rendered them by the defendant as their trustee. There is no rule of law which under the circumstances here shown, required the complainants in dealing with the defendant to have acted upon the assumption that he was dishonest, and equity will not deny them redress because they failed to act upon such assumption. Such an attitude would be entirely inconsistent with the confidence they reposed in him. That confidence in the

nature of things precluded any suspicion or any questioning in their minds of his actions or statements.

(b) The Federal rule.

The cause at bar is by far a stronger one than

Kilbourn v. Sunderland, 130 U. S. 505, 518, 519, where the complainants proceeded upon the liability of the defendants to account for the unauthorized appropriation of moneys received as complainants' agents, the amount of which they sought to reduce by excessive charges for the care and management of complainants' property; and also for certain differences between what was paid by complainants for property purchased through defendant at one price, though obtained by defendant at another. *The defense set up was that their claim was stale, that there had been a settlement by payment of a money balance, and that the three-year statute of limitations had run, and that the account had become a stated account through acquiescence and that they were estopped by receiving and receipting in full for the balance shown thereby \$2715.58.*

Mr. Chief Justice Fuller delivered the opinion of the Court in which he said:

“In answer to the defenses of laches and limitation the complainants contend that the alleged bad faith of defendants was not discovered by them until a short time before the bill was filed, and that they had no intelligible information of the excess in charges for care and management until late in June, 1878.

“Reasonable diligence is of course essential to invoking the activity of the court, but what constitutes such diligence depends upon the facts of the

particular case. Where a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery, and mere submission to an injury after the act inflicting it is completed cannot generally, and in the absence of other circumstances, take away a right of action, unless such acquiescence continues for the period limited by the statute for the enforcement of such right. We hold that the complainants moved with sufficient promptness upon discovering the fraud, and that *although, reposing confidence in their agent, they may have neglected availing themselves of some source of knowledge they might have sought, the defendant cannot be allowed to say that complainants ought to have suspected them, and are chargeable with what they might have found out by enquiry aroused by such suspicion.*

“And we are satisfied from the evidence that this suit was commenced as against each and all the defendants within the statutory period, *after information of the charges for care and management reached the complainants, and that the accounts were so rendered that the rule of acquiescence ordinarily obtaining as between merchants is not applicable here.*”

It is the utter failure on the part of the trial Court to appreciate this relation of trust and confidence which is responsible for its holding in effect that “complainants should have acted with more promptness”.

The complainants are not chargeable with laches, but on the contrary in view of the relations which existed between them and the defendant, they acted with the most exact promptness. They investigated promptly as soon as they suspected that they had not been fairly dealt with and appealed to a Court of Equity as soon as they were informed of the facts in the Seynei case

and of Judge Van Fleet's scathing arraignment of this same defendant at its close.

As was said by Judge Ward in a recent case,

Bogert v. Southern Pacific Co., 244 Fed. at 64:

"So far as the defense of laches depends, not on the mere passage of time, but upon another familiar ground, viz., a change in the situation prejudicial to the defendant, there is no evidence whatever to sustain it. The exact nature of the case has been known to the defendant from the beginning. No equities have intervened."

XVIII.

LACHES.

SECOND SUBDIVISION.

Nor are the complainants chargeable with constructive notice of any fact relating to the property.

In a relation of trust, the beneficiary is not chargeable with constructive notice of any fact, actual notice of which should have been given by the trustee.

To hold in this case that the complainants had constructive notice of any fact relating to their property would be contrary to the very spirit of equity. Yet this fundamental rule of equity was ignored by the trial Court.

In *Arkins v. Arkins*, 77 Pac. 256, 258, (Colo.) the Court said:

"The defendant seeks to escape the principle above announced by invoking the aid of the well-settled principle that the presumption is that, if the party affected by any fraudulent transaction or management might with ordinary care and attention have seasonably detected it, he seasonably had

actual notice of it, and cites *Pipe v. Smith*, 5 Colo. 146, 159, in support of her contention. The cases holding the above doctrine, including *Pipe v. Smith*, upon examination are found to be cases wherein the facts as disclosed by the record imposed upon the party some duty of investigation. In *Pipe v. Smith* the record discloses that the 'least ordinary diligence' would have disclosed and discovered the fraud complained of. *In the case under consideration, the relation of principal and agent, being admitted, warranted the plaintiff in placing implicit trust and confidence in the statements made to her by the defendant, and imposed upon her no duty of making enquiry to ascertain the truth or falsity thereof. The plaintiff had a perfect right to rely implicitly upon such statements.'*

In *Lazelere v. Starkweather*, 38 Mich. 96, at 107, which was *not* a case involving any confidential relation, the Court said:

"There are cases which go very far in extending the doctrine of laches in applying the rule of constructive notice. We think, however, the better and certainly the safer rule to be that a mere want of caution is not sufficient,—*not that he had incautiously neglected to make enquiries, but that he had designedly abstained from making enquiry for the very purpose of avoiding knowledge. In other words, that he acted in bad faith.*"

Isaacs standing in the relation to them—*both in fact and under the pleadings*—as their trustee, the complainants under no circumstances could be charged with laches until after their knowledge of the evidence and Judge Van Fleet's opinion in the *Seynei* case, relating to a portion of this same trust fund, their property, a few days before the commencement of the cause at bar. Upon that knowledge, their demand for an accounting

upon the defendant, his curt refusal, and their appeal to equity for an accounting, occurred almost simultaneously.

There is no finding in the opinion of the trial Court of the ultimate fact that the action is barred by the laches, statute of limitation or unreasonable delay of the complainants. Instead of these the Court most indirectly and ambiguously infers certain probative facts which are totally unsupported by the record. There is no holding that the complainants *did know the facts of their trustee's various frauds and personal profits against their interest*, nor is there any holding that *any rights have arisen founded upon the complainants' alleged lack of promptness*.

XIX.

LACHES.

THIRD SUBDIVISION.

The trustee cannot raise the issue against his beneficiary.

In *Ross v. Payson*, 160 Ill. 360, 43 N. E. 399, 402, which was an action to set aside a deed from a client to his attorney, it appearing that the defendant had been in possession of the property for seven years and that the deed was made fourteen years before the commencement of the action, the Court, in holding that plaintiff was not barred by laches, said:

“That laches may be interposed as a defense in an action of this kind was expressly held in *Elmore v. Johnson*, supra, and in principle announced in many previous decisions of this Court. The rule laid down in *Wood v. Downes*, 18 Ves. 130, note 1, was approvingly referred to in the *Elmore* case, and it is to the effect that, ‘*length of time weighs less in such a case than in any other*’ and that it is

extremely difficult for a confidential agent to set up an available defense grounded on the laches of his employer. We think there is great force, reason and equity in this statement of the law. It is further said in the Elmore case: Where bills are filed to set aside contracts or deeds between parties standing in a confidential relation with each other, the defense of laches is not usually regarded with favor."

In *Hovey v. Bradbury*, 112 Cal. 620, the owner of stock in a corporation, upon departing from the state, transferred the stock in trust to an intimate friend, that he might represent it for him, and vote it at corporate elections, and there were express acknowledgments of the trust upon each failure to account for dividends upon the stock, with a promise to account therefor, and no repudiation of the trust was brought home to the knowledge of the beneficiary. In holding that the failure of the beneficiary of the trust to insist upon an accounting of the dividends for eight years did not constitute laches the Supreme Court of California through Mr. Justice Henshaw said:

"Nor, when we come to view plaintiff's conduct generally can there be seen any act or omission upon his part which would justify so stern a treatment of his claim as its rejection under the doctrine of laches. The doctrine, as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. *It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent.* Whether or not the doctrine applies depends and must depend, therefore, upon the circumstances of each case. It is usually applied where a plaintiff

with knowledge that his rights have been invaded, or his trust repudiated, has submitted to unconscionable delay, during which other rights have arisen, founded somewhat upon his silence and acquiescence. *But it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong. Nor was it ever designed to be a check upon the right of a person to impose confidence and trust in another.*"

XX.

THE FINAL DECREE ENTERED IN THE TRIAL COURT SHOULD BE SET ASIDE AND ITS DECISION REVERSED (Assignment of Error XLIV).

In holding that a transaction such as the one here involved will be permitted to stand, even though there was an element of bad faith and both actual and constructive fraud appear upon the record, and in its refusal to consider or receive in evidence all testimony showing actual fraud, the decision and attitude of the District Court wholly disregards the well established equitable rule that proof of any suppression, concealment, unfairness or actual fraud gives the beneficiary the absolute right to set aside the transaction.

This is, I believe, the first decision ever rendered by a Federal Court which even intimates that the trustee's bad faith by which he personally profited in a transaction between himself and his beneficiaries, may be excused when impeached in equity.

In so holding, it is respectfully submitted, the District Court has wholly disregarded the established rule of equity that any suppression, any concealment, any unfairness, any actual fraud, gives the beneficiary the absolute right to set the transaction aside.

The record of this cause shows clearly that upon the trial the complainants proved conclusively that their trustee did not act in good faith, but that in fact he was guilty of many torts, suppression, concealment, unfairness and of *bald, actual fraud*, and had made large personal profits from his dishonest handling of the trust fund they had placed in his hands through the confidence they reposed in him.

And yet under these circumstances the trial Court decision has held that, although their trustee did not act in good faith in these particulars, such lack of good faith is not sufficient to put the stamp of fraud upon the transaction.

In a transaction of this kind an agent or trustee acts either in good faith, or in bad faith. There is no middle course. The beneficiary is entitled to the exercise of the "*highest good faith*" and the trustee is forbidden to exercise the "*slightest bad faith*".

As said in *Mechem on Agency* (Sec. 1221, 2nd Ed.), a transaction of this kind will not be permitted to stand unless the agent shows "*that there was no suppression or concealment which might have influenced the conduct of the principal*".

Professor Pomeroy (*2 Pomeroy's Eq. Juris.*, Sec. 959) states that in a transaction where an agent purchases from his principal:

"Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the agent's good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal."

The District Court erred in its decision in holding and concluding:

“The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake” (Tr. p. 42),

and its inference thereon that there was no other proof. Such however, are not “*alone*” upon the record, as the evidence shows this trustee on the very day he opened his retail sale for the complainants going to an out-of-the-way *private* banker and hiring a safe deposit box and visiting it an average of three times a week during the complainants’ sale, although he had his own personal account in the Seattle National Bank and the use of a neighbor’s (M. Aronson’s) safe; his bringing his wife and daughter over *one thousand miles*, from San Francisco, *to handle the complainants’ cash*; his fraud in lowering the bid for his sale in bulk to himself from 47% to 45%, thus directly cheating these companies out of \$492 to his personal gain; his fake auction for the sale in bulk; his careful elimination of bidders and competition for it; his *fraudulent lowering of the cost prices in and depreciation of the second inventory* to the extent of \$6500 or more for the purpose of his own percentage bid thereon; his laying some \$5000 of the best of the stock away in the balcony before the sale in bulk so that the public could not see it; his afterward bringing it down and selling it for himself on the Seynei sale; his refusal to give his beneficiaries an accounting; his reliance on the technical defenses of stated account, laches and the statute of limitations in an equity suit for an accounting brought by his *cestui que trust*; his

offering in evidence only \$2850 of outside checks from North Yakima as deposited in the Seattle National Bank when his own sister-in-law, who managed his North Yakima business, under subpoena testified the checks sent him from North Yakima during the period of his sale for the complainants at Seattle were some \$7000; his concealment of his bank books and check books and stubs from the Court and his expert accountant, Herrick; his offering copies of deposit slips of the Seattle National Bank amounting to only \$19,744.26 as deposited there while the bank's auditor testified in reality he deposited \$20,577 during the insurance retail sale; his concealment of the cash register totals, the adding machine totals, and salesmen's indexes from the Court and his own witness Herrick, which were the sole proof of the accuracy and integrity of the selected sales slips offered in court in loose leaf, and which would show how many were missing; his depreciation of these sales slips; his shortages of articles unaccounted for; his sophisticated pencil cash book; his claiming he sold the best of the stock for the complainants fairly at a loss of 20% from their original cost prices while selling the worst of it for himself at a gain of 10% over the same cost prices; his padded clerk hire and expense account; his non-production of a single original receipt; his claiming that he sold merchandise at retail for the complainants for 20% below inventory when the evidence of his own salesmen was that on that sale it was marked and sold an average of 20% above the same inventory; his careful taking of receipts at his own Seynei sale from the clerks but not one single

receipt for clerk hire at his sale as trustee for the complainants; his secret partnership with Mr. Seynei; his clandestine purchase in bulk under Seynei's name; his conducting the Seynei sale under the name Harry Seynei; his declarations he didn't want the companies or Main to know he had any interest in the stock; his taking commissions on his own hidden purchase; his misrepresentations as to the value and amount and condition of the merchandise and of the progress of the retail sale; his short, one-day notice of the sale in bulk; his personal profits on his secret purchase in bulk as shown by the Seynei books and third inventory; his claim that the "fire burned through the premises" while disinterested witnesses testified it was confined to six feet of floor space and that the serious damage was only \$500; the gross inadequacy of consideration for his purchase in bulk—all these, coupled with this trustee's "commingling of the trust fund with his own personal funds and his failure to keep such accounts as should be demanded of every trustee", the lower Court held "*did not constitute fraud*"!

In other words this surprising decision holds that these are not, and that no one of these circumstances is, of sufficient force to stamp the transaction as unfair, or unfairly entered into.

Clearly the District Court's decision is contrary to the well established rules of equity governing transactions of the kind here involved. These circumstances compel the inference that this trustee not only committed actual fraud but concealed facts which might have influenced the conduct of his beneficiaries; and the rule of equity

is that where there is the slightest fraud or concealment proved, the transaction must be set aside. These circumstances compel the inference that this trustee acted unfairly, and the rule of equity is that where any unfairness is shown the transaction must be set aside.

Where circumstances such as those here existing are shown by such undisputed evidence, the only inference that can be drawn is that the entire transaction was fraudulent and unfair. Any one of these circumstances being admitted to exist, the enquiry ends at once, and the beneficiary is entitled to a decree for the return of the full value of the trust fund, with interest, together with the trustee's profits thereon, less the amount he has already paid.

The decision of the District Court is erroneous in holding in effect that the Chancellor has discretion to refuse relief in a case where actual fraud, suppression, concealment and unfairness are thus shown by practically unconflicting evidence.

XXI.

IN CONCLUSION

**THE COMPLAINANTS RESPECTFULLY REQUEST A JUST DECREE
DE NOVO IN THIS COURT UPON THE RECORD.**

I regret that I have been obliged unduly to extend this brief for the appellant companies, but I think that the questions involved excuse if they do not justify its length, and inasmuch as these questions are of general and vital importance to all fire insurance companies

who are or hereafter may be concerned in proceedings of like character, I hope that the Court may see that the public interests and the rights of litigants will justify and indeed do require a reversal and setting aside of the decree in the Court below and the rendition *de novo* of a just decree by this Court.

An appeal in a suit in equity invokes a trial *de novo* in the Appellate Court and entitles the appellant to a just decree.

Central Imp. Co. v. Cambria Steel Co., 201 Fed. 818.

This is especially so in a cause like the one at bar which comes up on a broad appeal.

Mt. Vernon Co. v. Wolf Co., 188 Fed, at 168.

This suit is in equity. In *Waterloo Mining Co. v. Doe*, 82 Fed. Rep., at 51, the Circuit Court of Appeals for this circuit has said:

“It is further urged by appellees that this court is bound by the findings of facts of the circuit court unless they are found to be clearly and palpably erroneous. On appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits.”

And the Courts of Appeal in other circuits have declared that even in cases where the evidence is conflicting and the Chancellor has made a finding and decree thereon, the Appellate Court will not hesitate to disturb such findings if some serious mistake has been made in the consideration of the evidence, or if an obvious error has intervened in the application of the law.

With the utmost respect for the learned Judge of the trial Court, it must be insisted that it would be a judicial wrong to permit the opinion and decree thereon in this cause to stand.

The trial Court opinion holds in effect that it was proper for it to disregard completely evidences of bad faith if in the opinion of the Court they were not of sufficient force to put the stamp of fraud on the transaction. In this regard it is respectfully submitted the decision and decree are absolutely without precedent.

It is respectfully submitted that the trial Court decree holds that unconscionable conduct on the part of a confidential agent or trustee may be excused. Its effect is to substitute, in lieu of the requirement that the agent or trustee shall exercise the highest degree of good faith, a less exacting requirement. It directly sanctions the erroneous doctrine that there may be concealment or unfairness, and that nevertheless the Chancellor may refuse relief—that proof of concealment or unfairness or actual fraud does not necessarily entitle the principal or beneficiary to repudiate the transaction. It substitutes for the established equitable rule that any concealment or unfairness absolutely entitles the *cetui que trust* to a recovery of the value of the trust fund together with their trustee's profits thereon, the erroneous doctrine that a transaction between a principal and confidential agent or trustee and beneficiary, may be permitted to stand although tainted with concealment, actual fraud and unfairness. It is most respectfully submitted, that in a case where it is established by the evidence that there was actual fraud, concealment and unfairness, the Chancellor

is bound to grant the relief prayed for. In such a case there is no room for the exercise of discretion.

I believe that if the Court upon the trial had allowed the evidence to have been written up before making its decision, the taking of this appeal by the complainants would have been unnecessary. Many of the matters covered by its opinion rest upon asserted details of testimony which evidently the Court's recollection did not extend to. The parties were some days in court, and to remember the details of the evidence without having the assistance of a transcript was manifestly impossible, and the consequent errors of the decision could so probably not have been avoided.

The complainants therefore pray that the said decree dismissing their bill be reversed, and that the Honorable, the United States District Court for the Southern Division of the Northern District of California, Second Division, be directed to enter such decree as is meet in the premises; or that this Honorable Court shall reverse said decree and render a proper decree on the record, and a judgment for their costs and disbursements herein together with their costs and disbursements in said trial Court, and a reasonable sum for their counsel fees covering this litigation.

Dated, San Francisco,
February 19, 1918.

Respectfully submitted,

JESSE OLNEY,

Solicitor and Counsel for Appellants.

(APPENDIX FOLLOWS.)

APPENDIX.

KLINK, BEAN & COMPANY

Offices
San Francisco
Los Angeles
Oakland

Accountants.
Business Counselors
Devisers of Business Systems.

Correspondents
New York
Chicago
Seattle

KOHL BUILDING,

SAN FRANCISCO, September 25, 1917.

Mr. Jesse Olney,
Humboldt Bank Building,
San Francisco, California.

Dear Sir:

Re American Central Insurance Co. vs. D. Isaacs:

Pursuant to your request, we have made a tabulation of the sales slips examined by us in the above suit with the following result:

	Suits	Overcoats	Pants
September 6	65	42	103
7			
8	34	21	45
9	19	2	34
10	23	2	44
11	14	4	39
12	18	3	26
13	43	22	81
14			
15	11	2	43
16	7	1	35
17	3	1	15
18	4	2	13
19	7	1	18
20	23	7	89
21			
22	12	8	22
23	7	1	27
24	5	3	17
25	5	2	25
26	6	1	20
27	13	4	53
Sundry Dates	100	17	52
Slips			
	419	146	801

Yours truly,
KLINK, BEAN & COMPANY,
By H. J. Cooper.

No. 3105

IN THE
United States Circuit Court of Appeals 2
For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURG, PA., SECURITY
INSURANCE COMPANY OF NEW HAVEN,
Appellants,

VS.

DAVID ISAACS,

Appellee.

BRIEF FOR APPELLEE.

BERT SCHLESINGER,

LEON E. PRESCOTT,

Attorneys for Appellee.

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURG, PA., SECURITY
INSURANCE COMPANY OF NEW HAVEN,
Appellants,

vs.

DAVID ISAACS,

Appellee.

BRIEF FOR APPELLEE.

We very much regret that in the discussion of this case counsel for the appellants has seen fit to indulge in offensive personalities concerning some of his own witnesses, the appellee and the distinguished judge who presided at the trial of this cause. We shall consume but little time in replying to insinuations which we regard as beneath the dignity of a reply. Counsel seeks to secure a reversal of the decree, not through legitimate argument of the facts and law, but by creating

a prejudice through immaterial innuendos which might more properly be addressed to a cheap vaudeville audience. We find interspersed in the brief such statements as this:

“Karl Shermer, Abe Kessler, Morris Buttnick, Isadore Colsky and Sam Cone, gentlemen whose very names smack of honesty and good intention, ‘friends of Mr. Isaacs,’—a picturesque band under whose black flag the defendant himself tells us he shipped when he ran up the Jolly Roger and bore down on this gold laden merchandise galleon of the complainants.”

(The record does not show that the testimony of these witnesses was before the court. Present counsel was not engaged until the trial of the cause, and he understands that these men testified by deposition, but on account of the failure to take the depositions in accordance with the rules of court, they were suppressed.)

There is nothing in the record to justify the aspersions sought to be cast upon the men bearing these names. It is no compliment to the intelligence of this court that counsel descends to this method of argument. His obvious purpose is to lodge a prejudice in a place dedicated to law and justice. Such appeals are not infrequently made by the blatant demagogue to the unthinking mob.

We find his own witnesses who testified against his contentions in this grotesque and highly imaginative case similarly abused, and then we find references such as these with respect to the distinguished judge who decided the cause:

“The court’s unquestioning acceptance and reception in evidence of this letter-proof report which was a most glaringly imaginative composition as bearing upon the accuracy of defendant’s figures and even upon his probity and honesty, was absurd and gross error, and repudiation of all the fundamental principles of evidence.” * * *

“It is a smiling commentary upon the utter inconsistency of the opinion and decision in the court below that the learned judge of the trial court failed utterly to grasp the significance of this exhibit.” * * *

“We say, with all due respect to the honored justice from Spokane who presided at the trial, that evidently the District Court, not to be outdone by this *largesse* on Herrick’s part, confirms him in it by accepting and receiving in evidence a ‘report’ of no ‘relatively large’ importance, being, as Herrick himself admits, an opinion not based on facts but depending in the last analysis on self-serving explanations ‘by Mr. D. Isaacs’ *de hors* the record and made *ex parte* weeks before the trial.”

“ * * * and its reception in evidence and adoption by the District Court as a white-wash of this trustee, was absurd and gross error and a repudiation of all the fundamental principles of evidence.”

With these preliminary remarks, for which we apologize to the court, we shall now proceed to a discussion of the case on the merits, in an endeavor to point out that the decree of Judge Rudkin is absolutely just and in complete harmony with the facts of the case.

ISSUES RAISED BY THE PLEADINGS.

Statement of Facts: Owing to the many changes of theories advanced by counsel in the lower court and in his brief, it is quite difficult to understand precisely what he claims. On behalf of the complainants he filed and verified personally several bills of complaint.

The first amended bill of complaint alleges that on the *11th day of August, 1913*, plaintiffs were insurers in various proportional amounts, of the stock of merchandise of A. Bridge & Company, in the City of Seattle, State of Washington; that on or about that date a fire occurred in said store, causing a loss to merchandise; that the assignee for said Bridge and plaintiffs could not agree upon the amount of damage; that the stock was inventoried at the sum of \$48,000, and after negotiations between plaintiffs and the assignee of the assured, the sound value of the stock *remaining after the fire was fixed at \$34,300*; that the plaintiffs purchased the entire stock of the assignee of Bridge for that amount; that defendant contracted with plaintiffs to dispose of the stock of merchandise; that he advanced a guarantee of \$18,100 in cash; that he took over the stock in its entirety and agreed to sell and dispose of the same to the best possible advantage, and to return all moneys received by him from such sale over and above his guarantee and actual expenses; that as such trustee he sold all of plaintiffs' stock, but that he *did not return to them the moneys taken in by him on such sale over and*

above his guarantee and actual expenses, but retained large sums which plaintiffs are unable to state; that on November 26, 1913, defendant rendered a statement (see statement in paragraph III of plaintiffs' bill); that "the said net proceeds were paid over to your complainants who at the time believed and had no other knowledge nor had any information of any kind to put them on inquiry to question the said statement or good faith of the defendant;" that "your complainants are informed and believe that said statement did not constitute a full accounting by said defendant, and that the expense items in said statement are excessive, and likewise the totals are false and untrue," and complainants ask discovery of the "entire true expenditures and receipts of said sale;" that since the rendition of the statement a suit was begun in this court against the defendant, entitled "Seynei vs. Isaacs," to establish a partnership; that hearings were had over a period of a year and a half, and brought to a conclusion on the 9th of February, 1916; that upon such hearings evidence was given under oath by defendant's partner, "who managed the entire sale in Seattle conducted by the defendant for complainants' account," that sums in cash were received by said defendant upon the said sale for the account of the insurance companies largely in excess of the sum of \$28,901.92, which defendant claimed in his above statement to be the total of receipts; that this knowledge of the fact has only come of recent date and was not made known to complainants before "ten days prior to filing of this

bill of complaint;” that plaintiffs reside in other states and had no personal knowledge of the facts; that they believed the representations of said trustee to be true; that complainants were in ignorance of their falsity, accepted as true “said misrepresentations and the facts therein contained;” that thereafter the fact of the falsity of said statement has been sedulously concealed by said defendant to the present time. This bill was filed on the 4th day of May, 1916.

ANSWER TO FIRST AMENDED BILL.

An answer to this first amended bill was filed on June 15, 1916. The answer sets out that the sound value of the stock was inventoried by Bridge at \$45,954, and that the sound value of the stock before the fire was fixed at \$34,300; it avers that at the time of the rendition of the statement, complainants had full knowledge of all the matters and things alleged in the statement; denies that the statement did not constitute full accounting; denies that the expense items were excessive; denies that at any hearings any evidence was given under oath by the defendant’s partner that sums in cash were received by defendant upon the said sale to the account of complainants in excess of the sum of \$28,901.92, and that if any such evidence was given it was false; denies any fraudulent concealment of any facts by defendant; denies that the sale of the Bridge stock

was for a sum greater than \$28,901.92, the amount mentioned in the statement; denies that defendant ever refused to account, or that complainants requested any accounting; admits that defendant had in his possession the Bridge stock of merchandise; admits that complainants paid the assignee \$34,300 in cash, of which defendant contributed \$18,100; denies that complainants were compelled to employ counsel, but alleges that the attorney for complainants sought out complainants, informing them that he had been successful in obtaining a judgment against defendant in the action of *Seynei v. Isaacs* and that if they would permit him to act as their attorney in an action to be brought against defendant for an accounting, said Olney "would accept said employment on a contingent fee"; that with said understandings complainants employed said Olney as their attorney in the above entitled matter.

Then follows affirmative defenses, among which it is alleged (page 8 of answer) that payment by defendant of \$18,100 was made upon the understanding that complainants employed defendant to sell the remaining stock of merchandise, for which services complainants were to pay him twenty per cent of all sums realized on account of the sale, as also all expenses and costs of maintenance, incident to, and in the sale of said merchandise; that on the 26th of November, 1913, defendant rendered to complainants a full, true and complete statement of all sums received by him under his employment; that

complainants accepted the money in full settlement of all matters and with full and complete knowledge thereof; that complainants are guilty of *laches and unreasonable delay* in the institution of the action, and that they had full information of all matters and things contained in the statement from the time of the rendition thereof.

AMENDMENT TO BILL FILED DURING TRIAL.

During the trial of the case while testimony was being introduced, an amendment was filed to the first amended bill, which amendment avers that the defendant sold in bulk secretly to himself, the balance of the stock remaining after the three weeks of sale; that knowledge was not communicated to the complainants, and that they only became aware of the same within ten days prior to the commencement of this action; that he sold secretly to himself between one-half and two-thirds of the entire merchandise, and the alleged sale was accomplished by only one day's notice, which was grossly inadequate; that he thus transferred to himself their said trust fund without bona fide competitive bids of any kind or nature; that he clandestinely credited to himself in his final statement a sum amounting to twenty per cent of his claimed consideration paid therefor, claiming the same unbeknown to them as commissions upon his own purchase. This amendment was likewise verified by Mr. Olney.

During the trial an answer was filed to this amendment, which sets up that an account was rendered at the time the bulk sale was made; that the bulk sale was made with plaintiffs' knowledge and consent; that plaintiffs had full knowledge of the fact at least three years prior to the filing of the amendment and made no objection thereto; it denies that knowledge was not communicated to plaintiffs at any time by defendant, and avers that the matter of the sale was discussed with plaintiffs and their agents prior to the making thereof; it further avers that plaintiffs made no objection to the sale until the 31st day of January, 1917, the date upon which the amendment was first filed; it denies that notice of sale was insufficient; it avers that there were competitive bids of bona fide bidders, and that defendant's bid was the highest bid therefor; that the lowest bid was in the neighborhood of \$4000; that for more than three years plaintiffs had full knowledge of the bidding and the manner of obtaining bids and made no objection thereto, but on the contrary received the amount of defendant's bid on the 28th of November, 1913, and retained his money; that he openly credited himself in his final statement with the amount of his commissions; that he openly claimed to be entitled thereto; that his claim therefor was known to plaintiffs and was allowed by them; that plaintiffs made no objection thereto of any kind until the 31st of January, 1917, although they had full knowledge for more than three years prior to that time.

(Then follows an averment that no acts of diligence on the part of plaintiffs were shown; that it appears upon the face of the complaint that they were and are guilty of laches and there is no averment excusing delays on the part of plaintiffs or showing concealment of any facts from plaintiffs, and there is no averment showing that by the exercise of ordinary diligence the discovery might not have been sooner made; that the alleged cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.)

With the pleadings in this situation, the trial proceeded.

Before discussing the questions of law involved and authorities applicable to the facts, we will briefly advert to the facts of the case.

Statement of Facts.

The defendant, Mr. Isaacs, had been engaged in the business of handling salvage merchandise for the insurance companies for upwards of fifteen years, and on the 15th day of August, 1913, he received a telegram from George C. Main, agent of complainants, calling him to Seattle. On his arrival Mr. Main presented him with an inventory of the Bridge stock and asked him to examine it

and report to him. Isaacs reported that the stock was subject to considerable depreciation, that it was old and the inventory filed by Bridge inflated; *that the value of the goods before the fire was in the neighborhood of \$34,000*, and that in his judgment the fire loss was \$16,000. Main requested him to make him a proposition. Isaacs stated that if Bridge's assignee (Bridge being then insolvent) would not accept that figure, Main should get the sound value of the merchandise down where it belonged, namely, \$34,300, and an agreement permitting the use of the premises to run a sale. Main thereupon came in contact with Bridge's adjuster, who placed a value of some \$38,000 on the stock. Finally by way of compromise Bridge's adjuster agreed in placing the sound value at \$34,300, and thereupon Mr. Main, acting for the insurance companies, gave Bridge's assignee \$34,300 and became in that way the owners of the stock of damaged goods, and were relieved from their insurance liability to Bridge's assignee. Before paying out this money, however, Mr. Main, on behalf of the companies, entered into this arrangement with Isaacs: Isaacs was to advance \$18,100 of the \$34,300 to be paid to Bridge's assignee, and Isaacs did give Mr. Main his check for \$18,100, and it was agreed that he should conduct a retail fire sale for the benefit of the insurance companies out of which he was to be paid a commission of 20% and expenses of sale of the stock. This was no new venture for Mr. Isaacs, as he had been engaged in similar busi-

ness transactions with insurance companies for upwards of fifteen years.

It will be borne in mind that the insurance companies were to take over the Bridge stock on the payment of \$34,300, their investment therein was to be \$16,200, and Mr. Isaacs was to advance the balance, \$18,100. Originally the complainants were willing through Mr. Main to allow the insured on account of damage between \$13,000 and \$14,000. In other words, the companies conceded that they were liable for this latter sum. Whether they purchased the stock or not they were compelled to pay at least \$14,000 to get rid of their liability on their insurance policies; their purchase by paying \$16,200 toward the \$34,300 purchase relieved them of all liability on the policies.

The court will therefore at once see—"that the gold laden merchandise galleon of the complainants"—represented an investment to the complainants over and above their admitted liability of the precise sum of \$2200, this being the difference between \$14,000, which they were willing to pay on their policies and \$16,200 which they contributed toward the purchase price of the goods under the Main-Isaacs' purchase.

Mr. Isaacs took possession of the stock on the 7th day of September, 1913, but the business was conducted under the name of H. C. Seynei. He had been manager and buyer for Mr. Bridge for eleven years preceding the fire, and was acquainted

with the stock as well as with the customers, and by conducting the business under the name of H. C. Seynei it was thought trade might be attracted. It was not the intention of either the insurance companies or Isaacs to prolong the sale or to run a retail merchandise store, but to conduct rather a hurry-up sale. There was no permanent selling organization and no cashiers and no bookkeepers. Isaacs was eager to keep down his expenses and he economized in every possible way. He was only interested in three things, namely, to receive his return of \$18,100, his 20% commission and expenses incurred and to return a profit, if possible, to the complainants. Mr. Isaacs took possession under his guarantee and proceeded with the sale on the 7th of September, 1913. He engaged a Mr. Bass, not "a mysterious Mr. Bass," to take possession of the stock. The keys were turned over to Mr. Main. Mr. Sidder, an agent of Mr. Isaacs, was instructed to engage Mr. Seynei because of his experience and familiarity with Bridge's customers. Mr. Sidder and Mr. Seynei marked the goods for sale. The goods were thereupon sold to the public at retail as an ordinary fire sale is conducted. The receipts of the first few days were up to expectations, then they rather dwindled, and during Isaacs' possession of the store and management of the sale he frequently met Mr. Main and conversed with him concerning the progress of things at the store. A time arrives in fire sales when a retail sale can no longer be conducted, and it is deemed

advisable to put up the entire stock in bulk. This happened here after 19 days of retailing. Mr. Main said to Isaacs: "Use your own judgment; if you sell it in bulk to the merchants here they will steal it; I don't think you will get 30% for the stock." Isaacs then informed him that he had anticipated going in business in the northwest, and that provided he could get a lease on the premises he would put in a bid on the stock himself in the name of some other person, and then if anyone was willing to pay more than his bid they could take the stock. Mr. Main, acting for the complainants, agreed to this, and agreed that he, Isaacs, could put in a bid in his own behalf at a figure which he thought would represent the "fair value of the assets" as they then stood, and then if any other bid came along that was higher than his, they, the other parties bidding, should have it, because that would mean the stock would bring all it was worth. Main thought there was *nothing objectionable in the plan*. Isaacs thereupon advertised and received eight or ten bids. Mr. Main asked him how he would conduct the sale and he stated that he would notify all the merchants in and around Seattle accustomed to buying and dealing in that kind of merchandise. Isaacs notified eight or ten such dealers and the bids ranged all the way from 25% to 30%. The names of the merchants so bidding are given, their financial standing is unquestioned, and there was no charge or claim of collusion between Isaacs and

these bidders. The testimony further shows that the bidders came up to the store before the sale and Mr. Isaacs showed them the original inventory given to him by Mr. Main. He also inserted an advertisement in the "Sunday Times," and on Monday morning he gave to the merchants who came into the store a copy of the inventory taken of the goods, and at the request of the bidders the time of sale was continued for one hour, and there were fifty persons on the premises at the time of the sale, and the bids were opened and read in the presence of all the people on the premises. Isaacs' bid was 45%. It aggregated \$11,094. Three or four days before the sale Mr. Isaacs told Mr. Main, the insurance companies' agent (being the only one with whom Mr. Isaacs had negotiated) that he was bidding over 40% or 45% on the dollar. From that time on the insurance companies ceased to have any interest in the premises. The business had then been purchased by Mr. Isaacs from the companies who had purchased it originally from Bridge's assignee, partly with Mr. Isaacs' money. From that time on Mr. Isaacs owned the lease on the store and ran it through Mr. Seynei. Seynei was taken in without any investment, but afterwards claimed a partnership, basing his claim on two grounds, one an unsigned agreement and the other the fact that the business was being conducted under his name. (We are not, however, concerned with this controversy here.) The facts which we have given here are testified to in minute detail by David Isaacs

(see Tr. pp. 142 to 157, inc.) and he is corroborated in nearly every detail by the testimony of George C. Main, called by the complainants and by J. R. Mason, likewise called by the complainants.

TESTIMONY OF GEO. C. MAIN, AGENT OF COMPLAINANTS.

Mr. Main testified substantially as follows:

“The maximum that I was willing to allow the insured on account of damage by fire was between \$13,000 and \$14,000. Bridge, the insured, claimed over \$18,000 as his loss. The fire claim was \$16,200. I could not agree with the assured as to the loss so I worked down the value of the stock as low as possible for the complainants to take over the stock in bulk at as low a valuation as possible as a speculation, expecting them to realize a substantial gain on it at retail over and above the amount we could have adjusted the loss at *with the assured*. * * * I had a guarantee of \$18,100 above expenses from this defendant if the complainants took over the Bridge stock for \$34,300, and upon that guarantee I settled with the insured, paying the \$34,300 cash and taking the stock. I did not consider there was an opportunity to obtain more than the defendant’s guarantee and expenses. I was free to drive a better bargain if I thought I could make one. *In my opinion it was a fair proposition*. I never put it up to anybody else. I hoped there might be a substantial sum beyond Isaacs’ guarantee and expenses and so advised the complainants. * * * A salvage man does not always make a profit above his guarantee, and I have known where a deficit was reported. I was disappointed with the small balance paid the complainants by the defend-

ant, and so expressed myself to them. As a matter of fact, this \$1049.81 paid the complainants by the defendant amounted practically to only 1/16th part of the loss to them."

(It is to be borne in mind, however, that they were willing to allow the insured between \$13,000 and \$14,000 without taking over the stock, hence the amount of the insurance companies' loss on the Isaacs' transaction practically amounts to nothing.)

"Isaacs undertook the sale of this stock and sold the merchandise as trustee for the complainants after their purchase of it in bulk for \$34,300 cash. The defendant proceeded to sell the entire stock. He made his final report to the complainants through me in the latter part of November, 1913 (Deft. Ex. '2-Q'), with a letter (Complainants' Exhibit 'A'), which report I accepted without an opportunity to verify it, as Mr. Isaacs and his papers were then in San Francisco. After this statement was received, I saw him numerous times, but never signified any desire for a more detailed account of the receipts and disbursements in connection with the retail sale.

I think I was out of town at the time of the sale in bulk and had no knowledge that Isaacs was a bidder and bought the stock. He told me so afterwards. The fact that it was to be sold in bulk was talked over between the defendant and myself before it was advertised. I do not know how long before or when. He said that expenses were beginning to eat up the stock and that he thought it best to sell it under sealed bids and I agreed with him that there would be a loss in conducting the sale any longer. As to his method of disposing of it, it was wholly in his hands. I had nothing to do with it. He could do as he pleased.

I told him, however, if it were put up at sealed bids it could go at a very low figure, that they would steal it from him. He said substantially that he would see that we were protected on that proposition; that he would put in a bid in his own behalf at a figure which he thought would represent the fair value of the assets as they then stood and that if any other bid came along that was higher than his the other party was welcome to it, because it would mean that the stock would bring all it was worth. There was nothing in this plan as he outlined it to me that I thought was objectionable.

I understood after the sale in bulk what he paid for it. I knew because I knew the amount of the inventory and his bid was something about eleven thousand dollars, which was forty or forty-five per cent of the invoice, the original invoice price of the goods. I thought at the time it was a very good bid. Looking at it now it seems we might have done better.

The inventory of \$24,000 I did not make. Isaacs made it. I understood perfectly it was based on the Bridge inventory price. I did not make it so I could not swear positively, but it was about 45% of the original Bridge inventory, which I understood was the purchase price. When Isaacs took the inventory of the stock that was left after the retail sale, that was taken on the same basis as the original Bridge inventory of forty-five or forty-six thousand dollars, as far as I know, and I understood nothing was marked down on account of damage.

I have been an adjuster for twenty-five years and have done a great deal of adjusting for the complainants and am still doing work for them. I concluded that the first inventory had been fairly taken by Bridge at the original cost price, but much of the merchandise was old,

some of the clothing at least twelve or fifteen years old, and many items were not worth anywhere near the original cost price. Ordinarily one day's notice of a sale is not customary and seems to me short, and would tend to cut out competition if the bidders had not been notified in advance. There are several buyers right here where considerable competition is quickly obtained in the sale of large stocks of merchandise, and ready on short notice to examine a stock, figure on and bid for it. I have heard that Colsky, Buttnick and Westerman & Schermer put in bids. I thought at the time such notice was fair to complainants and sufficient and I have not changed my opinion on that. I went down to the store several times during the progress of the retail sale looking around to see how the sale was going, but did not make any examination of the stock just before the sale in bulk.

At a retail sale the best merchandise sells first.

My stenographer told me that someone from the store came to my office every day with a bundle of sales slips. They might have been added up on my adding machine. I could not say whether, after being added up, they were left with my stenographer. These sales slips were never sent to me as a daily report by the defendant. I never received them as such. My office had nothing whatever to do with them except that the defendant used my adding machine." (Tr. pp. 120 to 123, inc.)

Mr. Main further testified that he thought the inventories were fairly taken, and that while ordinarily one day's notice of a sale is not customary, he thought the notice to bidders "was fair to complainants and sufficient, and *I have not changed*

my opinion on that." (See testimony George C. Main, pp. 118-122.)

Mr. J. R. Mason, the adjuster for Bridge's assignee, likewise called for complainants, testified that he was an adjuster of fire losses, and that he makes a business of examining stocks and merchandise and placing values thereon, and is an expert in estimating the value of merchandise losses. That he was engaged by Bridge's assignee to adjust the loss of the Bridge fire. In speaking of the notice to bidders, he testified that any notice that would be sufficient to assemble a requisite number of responsible buyers in competitive business would be fair, and that such sale was conducted under such circumstances as made it probable that as much had been realized as might have been if there had been more extended advertising in the newspapers.

* * * "Knowing that Isaacs is expert in fire losses, I consider that if he bought the stock at \$11,000 he would expect to make a profit, and to that profit you would have to add expenses to arrive at the actual value of that stock. * * * If the balance of the stock sold in bulk was more than half the stock, it could not have all been remnants. Of course the lines are broken. *I consider \$11,000 a fair valuation of a stock, the other half of which sold at retail at \$17,800.* That is just about the usual percentage of profit of a retail sale, not a fire sale."

This was elicited from Mr. Mason on direct examination of the complainants. Mr. Mason further

testified that he inventoried everything in the store; that is all he knew about.

This last testimony quoted above applies peculiarly to the sale to Isaacs in bulk after he had closed the retail sale. We shall now show by documentary evidence that Isaacs properly accounted for every dollar received by him on behalf of the complainants, and that he made the accounting when under the law and good rules of business he was compelled so to do, and that he is not to be mulcted at this late date because counsel for the complainants has rescued from the ashes of the Bridge fire loss of \$16,200 three law suits, one for the sum of \$100,000 against Mr. Truax, credit man of the Seattle National Bank; one on the part of Seynei, who had no investment, but sued for some \$6000 profits, and this present suit to recover a trust fund of \$60,000. The situation is indeed mystifying; how a man can have a fire loss of \$16,200, out of which may arise law suits involving \$166,000, is beyond comprehension. This large amount is represented by the astute counsel for the complainants. Counsel's share of these tremendous recoveries will, if made, indeed net him a handsome fee, and this may account for his tremendous industry.

ISAACS' STATEMENT OF ACCOUNT.

On November 26, 1913, Mr. Isaacs rendered a statement set out in the complaint as follows:

Defendant's Exhibit "2Q"

"COAST FIRE & MARINE SALVAGE Co.

D. Isaacs, Mgr.

1261 Market Street,

San Francisco.

STATEMENT—SALVAGE OF A. BRIDGE & Co.

Clothing, Furnishings, Shoes.

Net Sales\$28,901.92

Expense:

Rent\$ 920.00

Light 66.88

Advertising 1,204.21

Clerk Hire 1,655.21

Materials 90.84

Insurance 34.59

Commission for handling at 20% on \$28,901.92 5,780.38

Advanced as guarantee 18,100.00

\$27,852.11 \$27,852.11

Net Proceeds\$ 1,049.81"

Accompanying this was the following letter:

Plaintiff's Exhibit "A"

Letter, November 26, 1913, Isaacs to Main
"Dear Sir:—

I enclose herewith statement of A. Bridge Company, salvage, together with check for \$1049.81 to cover the net proceeds.

Trusting you will find same correct and satisfactory, I am,

Yours very respectfully,
COAST FIRE & MARINE SALVAGE Co.
By D. Isaacs."

Mr. Main, to whom the statement was rendered, wrote to his companies on December 8, 1913, the following letter:

Defendant's Exhibit "2T"

Letter, December 18, 1913, Main to Company.

"GEORGE C. MAIN
Adjuster of Fire Losses,
925 Leary Building,
Seattle.

Main 7835

Dec. 18, 1913.

To Companies Interested.

Gentlemen:

LOSS SEATTLE A. BRIDGE & Co.—FIRE AUG. 11, 1913.

I beg to enclose herewith copy of report on sale of salvage rendered by the Coast Fire & Marine Salvage Co. of San Francisco, from which will be seen that the total net recovery is \$1049.81.

You will also find enclosed check covering your proportion, the total insurance on stock being \$21,000.

I am pleased that we are able to report a substantial salvage, although not quite as much as I had hoped for, but this is easily explained owing to the adverse conditions which confronted Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory.

Kindly acknowledge receipt in due course, and oblige,

Yours very truly,

GEO. C. MAIN,
Adjuster."

GCM/M

We particularly call attention to the following language:

“However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory.”

Mr. Isaacs testified, and he is absolutely uncontradicted, that after he had purchased the stock in bulk he had many conferences with Mr. Main as to the amount he had paid for it, and on two different occasions went over with Mr. Main the various items included in the statement. (This being the statement set out in full herein, p. 236 Tr.) It was forwarded by Mr. Main to the companies on November 29, 1913. Before entering his final statement on November 29, 1913, Mr. Isaacs figured and informed Mr. Main of the amount of sales and commission on both sales, retail and bulk, at 20%. Mr. Main made no objection to the charge. They also discussed the amount of net proceeds to the complainants and Mr. Main raised no objection to any of the items. Mr. Isaacs further testified that the amount of \$28,901.92 represented in full the total amount received by him, both from retail and bulk sales. He explained in great detail on the witness stand how the sale was conducted; he went minutely into the matter of sales and daily realizations and daily expenses and his testimony is absolutely unimpeached as to the material matters involved.

The daughter of the defendant, Mrs. Florence Cohen, testified that she helped her father take cash during the nineteen days; that each clerk was furnished with a sales book which was numbered,

containing 50 blank sheets and a stub index on the back. When a sale was made the amount and character of the goods were written on the slip and put on file. An entry of the amount of the sale was made on the stub and these books each night were left at the desk and on the following day a new book was given the clerk. The next morning there was a check up of the previous day's sales slips to see if the clerks had added their books correctly and to find if they corresponded with the amount of the sales slips. Every day Mr. Bass and the witness took the sales slips to Mr. Main's office, where they were added on Mr. Main's adding machine to get the total sales and the slips were left there. (Tr. p. 160.) At the trial of the case these slips were produced having been first examined by Mr. Herrick, an accountant of unquestioned integrity and ability. Perhaps no accountant stands higher in his profession than Mr. Herrick. He was the auditor in chief of the Panama-Pacific Exposition. Mr. Herrick also examined a cash book produced by the defendant covering sales for 19 days. Mr. Herrick also examined other records produced by the defendant, including his bank book, showing his total deposits. Concerning the slips or daily tags, which of course were made out by the salesmen, he testified:

“These slips are itemized as to the amount of sales; this cash book is not likewise itemized as to the character of sales, it simply exhibits one entry appearing as total of sales for that day. He pointed out one discrepancy between

the amounts referred to in the original slips and the cash book kept by the defendant. He testified: 'Taking September 6, 1913, the cash book shows receipts of \$3307.95. There is a discrepancy of approximately \$10 between the slips and the cash book. The slips bear serial numbers but not one complete series, they bear the numbers appearing in the various books. These sales tags or slips appear, so far as I can determine, to be made in the due and regular course of business, do not bear any evidence or earmarks of changes, obliterations or alterations to any extent that would cause any suspicion.' (Tr. p. 132.)

It should be borne in mind that the defendant had nothing whatever to do with the several thousand slips which were produced. (Speaking of the production of these slips his Honor states in his opinion that at the trial the

"defendant produced several thousand sales slips showing the sales made during this period (19 days), the goods sold and the amount received therefor; the aggregate amount received as shown by these sales slips is within a few dollars of the amount reported by the defendant, and if we add to the last inventory the goods sold as disclosed by the sales slips, we will have approximately the goods shown by the first inventory. The sales slips are not impeached, as practically all of the goods have been accounted for, the claim that a much larger sum was received does not find support in the testimony.")

Speaking further of his entire examination, Mr. Herrick on cross-examination testified:

"From a standpoint of proper and complete accounting the records shown in the cash book

are crude, primitive and unsatisfactory. However, the main point is their integrity, and business *continuing indefinitely* could not proceed with such records; taking into consideration that this is what we call a hurry-up proposition, there was no organization of accounts or otherwise. *The entire transaction lasted three weeks. It appears to have been the intent of the defendant to keep an honest record,* and I see nothing indicating the contrary. Practically answering your question, the record is a very abominable accounting."

Mr. Herrick further testified that from his opinion based upon a careful consideration of the papers in evidence, the statement rendered by Mr. Isaacs to the insurance companies was correct. (Tr. p. 135.)

In connection with Mr. Herrick's testimony we particularly call the court's attention to the elaborate statement appearing at pages 238 and 244 of the Transcript, in which a complete and detailed accounting is given.

It might be well to mention here the significant fact that George T. Klink, the accountant, who was called by the complainants, does not question the integrity of the defendant's accounts. There is not the slightest intimation that the statement rendered by Mr. Isaacs was in any wise fraudulent, dishonest or even mistaken. (Testimony of Geo. T. Klink, Tr. pp. 84 to 85.)

The position of Mr. Isaacs is further upheld by the following admission by complainants' witnesses. Slight reference here being, we think, sufficient:

Harry C. Seynei under cross-examination, admits that two or three persons were present for the purpose of bidding and filed papers (he would not call them bids) stating the amount they would pay for the balance of the stock. (Tr. p. 65.)

Testimony of John Jeremy that three or four local merchants were present at the time of the sale of the merchandise in bulk; that Isaacs announced to them that "the time is up; the stock is sold to Harry Seynei," and that he had a few slips of paper in his hand which might have been bids. (Tr. p. 79.)

Testimony of J. R. Mason that forty-five per cent of the value of the stock remaining after a fire sale, is a reasonable price. (Tr. p. 115.) When the cost of operating a return sale reaches a certain point, a sale in bulk becomes advisable; that \$11,000 is a fair valuation of a stock, the other half of which sold at retail for \$17,800. (Tr. p. 116.)

We think we have set out sufficient facts to have the defendant's position understood.

Argument and Points and Authorities.

Counsel for the complainants has advanced many inconsistent theories, as shown.

THE FIRST AMENDED BILL AND AMENDMENT CONTAINED TWO DISTINCT GROUNDS OF COMPLAINT.

(1) The first amended bill of complaint asks for an accounting on the theory that the sale was

valid. The amended bill filed during the trial for the recovery of the value of a "trust fund" on the ground that the sale was void. The first amended bill of complaint asks for an accounting on the theory that the defendant disposed of the merchandise belonging to the complainants and that he did not "return all of the moneys taken in by him on such sale," and that his "expense items are excessive and his totals are false and untrue." The amendment to this bill filed during the trial charges "that the defendant sold in bulk and secretly to himself without their knowledge and consent, the balance of their said stock of merchandise remaining after only three weeks of his said sale for them in the City of Seattle, State of Washington." It will be seen that in the first amended bill the plaintiffs treat the entire sale as valid, the retail sales and the sale in bulk. In the amendment it is sought to separate the two sales and to treat the bulk sale as invalid. The sale in bulk is attacked for the first time on January 31, 1917, through the filing of the amendment. The sale occurred prior to November 26, 1913, when on that date a statement covering the entire transaction was rendered by the defendant to the plaintiffs, and prior to that date it was undisputed that defendant conferred with the agents of the plaintiff concerning said sale.

We do not rely for affirmance of this decree upon technical grounds, but this situation here presented was before the court in *Merriman v. Chicago & E. I. R. Co.*, 64 Fed. 550:

“If the bill is to be treated as a creditors’ bill, and as stating a good cause of action to reach and appropriate the bonds in controversy, then we have in the same bill: First, a cause of action to redeem and take from the Eastern Illinois Company all the property obtained by it from the Danville Company; and second, a cause of action to acquire and appropriate bonds by the Eastern Illinois Company to secure and confirm its title to the property so sought to be taken from it. Thus construed, the bill states *two inconsistent causes of action*; and the *right to recover upon one theory is destructive of the right to recover upon the other*. Such a bill cannot be maintained. It would be multifarious and self-contradictory. * * *

If the appellants’ case was solely that the Eastern Illinois Company has no title to the property of the Danville Company, they might pray for various forms of alternative relief consistent with that case; but they cannot in the same bill make a case *that it has no title*, and also a case *that it has a title*, and then ask for inconsistent relief according to the different cases thus made. Such course of procedure we do not understand is warranted by the doctrine of alternative relief. Such are alternative cases, and not cases of alternative relief. They are inconsistent, for a decree of one of these forms of relief would proceed upon a theory fatal to the other form of relief.”

In *Union Pacific Co. v. Wyler*, 158 U. S. 285; 39 L. ed. 983, the court, through Mr. Justice White, said:

“While a new cause of action may be introduced by amendment the established limitation on the operation of its relation to the commencement of the suit is, if the amendment

introduces a new matter or a different cause of action not within the *lis pendens*, as to which the statute of limitations has operated a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit. *Alabama G. S. Co. v. Smith*, 81 Ala. 229. * * *

Nor do we think this question is in any way affected by the fact that the second amended petition was filed by consent. The consent covered the right to file it, but did not waive the defenses thereto when filed."

In *Whalen v. Gordon*, 95 Fed. 308, the plaintiff's petition was for the recovery of damages for breach of warranty in contract of sale. An amended petition was filed setting forth a rescission of the contract, and seeking to recover the purchase price paid. It was held to state a new and different cause of action, although both causes arose out of the same transaction. In that case the Circuit Court of Appeals said:

"But an amendment which introduces a new or different cause of action, and makes a new or different demand, not before introduced or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed. * * *

Although these causes of action arose out of the same transaction, the supreme court of Iowa held that the cause stated in the amendment was different from that stated in the original petition, that the amendment did not relate back to the commencement of the action, and that the second cause of action was

barred by the statute. An extended review of the authorities seems unnecessary, because this court is bound by the decision of the supreme court of the United States, and its opinion in *Railway Co. v. Wyler* appears to us to end debate. In that case the cause of action in the original petition arose out of the same transaction as did that stated in the amendment,—out of the fact that a fellow servant negligently allowed a heavy iron dump to fall upon the plaintiff.”

In the case at bar, the causes of action being different, it necessarily follows that the matters stated in the amended complaint are barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California (contract) and by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California (fraud).

Rogers v. Byers, 1 Cal. App. 286;

Campbell v. Campbell, 133 Cal. 36.

**PLAINTIFFS' EXCUSES FOR THEIR APPARENT LACHES,
AND TO AVOID THE BAR OF THE STATUTE.**

Plaintiffs, in their amendment to the first amended bill, admit that they had knowledge of the sale by the defendant to himself at least on the 13th of February, 1916. Nevertheless, neither their original complaint nor their first amended bill makes any mention nor any claim for relief on that account. It is important to bear this in mind as bearing upon the question of the plaintiffs'

laches and positive acts of acquiescence. The undisputed testimony, however, shows that knowledge of this fact was in the possession of plaintiffs' representative at least on the *26th of November, 1913*, and more than three years prior to the filing of the amendment.

Plaintiffs' excuses for their delay in attacking the transactions are:

(1) That they reside in other states than that of Washington.

(2) That they had no *personal* knowledge of the facts pleaded.

(3) That they believed the representations of defendant.

(4) That the defendant concealed the facts up to the time of the filing of the amended bill.

Let us dispose of these "excuses" in their order, and then inquire whether they are valid excuses under the law.

(1) That They Reside in Other States Than That of Washington.

It is no excuse for delays of the character shown here, that the plaintiffs reside in distant states.

In *Bower v. Stein*, 177 Fed. 678, (9th Circ.) the Court of Appeals said:

"Unnecessary delay is deemed a waiver of the right. It is no excuse for such delay that the plaintiff is without means or resides in a distant state" (Citing cases).

The plaintiffs had agents resident within the state, and they had an agent for the transaction in question, at the very place it occurred.

(2) That They Had No Personal Knowledge of the Facts Pleaded.

Personal knowledge was not necessary. Plaintiffs' agent and representative had full knowledge. It is undisputed that all the dealings between defendant and the plaintiffs from their very inception to their conclusion were had with their agent and adjuster, George C. Main, and the complaint expressly recognizes this fact and his authority, for it refers to these dealings as being between the plaintiffs and the defendant. No question as to Mr. Main's authority was ever raised in any of the pleadings or in the evidence. He had complete authority to negotiate, receive and conclude, and plaintiffs accepted the benefits and ratified his every act.

In *Shappiro v. Goldberg*, 191 U. S. 241; 48 L. ed. 425, the court said:

“For this purpose *Richold was the agent of Shappiro*, and, it *not appearing in the proof that he was misled by the representations of Goldberg*, or that by any scheme or plan he was kept from a full examination of the title and the description of the property contained in the deed furnished, he must be held chargeable with knowledge which the opportunity before him afforded to investigate the extent of

and nature of the property conveyed and which he undertook to examine for the purchaser.

* * * * *

When the means of knowledge are open and at hand, or furnished to the purchaser *or his agent*, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor. (Citing cases.)

* * * * *

It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract."

It is a leading principle of law that as between a principal and a third person, that notice to an agent whose duty it is to act upon the information for his principal, or to communicate it to his principal, is notice to his principal. (*10 Cyc.* 1056.) Main had knowledge of all the facts on the 26th of November, 1913, when the bill of complaint alleges that the statement therein contained was "rendered to the complainants."

Mr. Kerr in his valuable treatise of the law of fraud and mistakes, states this rule:

"NOTICE TO THE AGENT IS NOTICE TO THE PRINCIPAL, FOR UPON GENERAL PRINCIPLES OF PUBLIC POLICY IT MUST BE TAKEN FOR GRANTED THAT THE PRINCIPAL KNOWS WHATEVER THE AGENT KNOWS."

Kerr on Fraud and Mistake, p. 258.

“THE PRINCIPAL OR CLIENT IS FIXED WITH THE KNOWLEDGE OF EVERY FACT MATERIAL TO THE TRANSACTION WHICH HIS AGENT OR SOLICITOR EITHER KNOWS OR HAS IMPARTED TO HIM IN THE COURSE OF HIS EMPLOYMENT, AND WHICH IT WAS HIS DUTY TO COMMUNICATE, WHETHER IT BE COMMUNICATED OR NOT.”
(Citing a large number of cases.)

Kerr on Fraud and Mistake, p. 258.

“THE DOCTRINE OF ACQUIESCENCE APPLIES EVEN AS BETWEEN A TRUSTEE AND CESTUI QUE TRUST EVEN IN CASES OF EXPRESS TRUST.”

Kerr on Fraud and Mistake, p. 303.

“THE RIGHT TO IMPEACH A TRANSACTION ON THE GROUND OF FRAUD MAY BE LOST BY INACTION, LAPSE OF TIME OR ACQUIESCENCE.”

Kerr on Fraud and Mistake, pp. 301-303.

These rules are recognized in the case of *Hammond v. Hopkins*, 143 U. S. 224; 36 L. ed. 146, a case involving a purchase by a trustee of trust property. In that case the court said:

“It will be perceived that the main charge of fraud in fact consists in an alleged conspiracy to obtain the property for less than it was worth. The claims that the sale was fixed at an unpropitious time and that the squares should have been subdivided and sold in lots, go to the adequacy of the price. If there were no such conspiracy, the specific charge falls to the ground, and if all the circumstances relied on to sustain it were actually known *or the appellees were chargeable with such knowledge, then it comes too late*. And if they were fully informed that *the trustees purchased*, and the latter made no false representations in relation to the sale, which mis-

led them, the attempted explanation of the lapse of time as bearing on the purchase by the trustees themselves also fails. * * *

The National Intelligencer was taken at the house, and the advertisement had been read, certainly, by Mrs. Early some time before. George Washington said to a witness, while Chapman was bidding: 'He is buying for Uncle George'; and Isaac H. was 'the first to come in from the sale; and he said that Chapman had bought the property for uncle George W. Hopkins and John, and he said they had paid as much for it as the property was worth.' The subject of the sale, and that George W. and John S. would purchase was frequently talked over as well before as after the sale, and the evidence demonstrates that there was no *secrecy or concealment about it*. * * *

All these complainants saw the brickyard being carried on as before, and George W. and John S. continuing to exercise acts of ownership over the property. They all had no doubt that either of the trustees would have given them any information they desired, and they all evidently had no objection to the trustees becoming the purchasers in and of itself. * * *

The vital question is, Did the appellees actually know, or were they *chargeable with knowledge of*, the fact of the purchase itself? What we have said in effect disposes of the suggestion that by false representations appellees were misled into believing that the sale was fairly conducted when it was not, and that this constitutes a sufficient explanation of the lapse of time."

We call the court's attention particularly to the exhibits referred to on pages 232 to 237 inclusive of the Transcript with reference to the transac-

tion, and it is to be borne in mind that in order that there could be no question as to Main's having communicated to the various companies the details of the transaction, we made the following request:

“In view of an adjournment and the reappearance of this witness on the stand, I ask that he produce as a part of his examination and cross-examination, the original inventory of Mr. Bridge, referred to in this examination, and proofs of loss filed by Mr. Bridge; and statements and correspondence between Mr. Main and the complaining companies, or whoever represented them at the time, in connection with this loss, and in connection with the arrangement with Mr. Isaacs for the handling of this stock, and in connection with the settlement made by Mr. Isaacs; and all correspondence in the possession of Mr. Main between himself and his principals, in which Mr. Isaacs' transactions occur in connection with the sale and are referred to * * *

Needlessly we showed at the trial, actual communication by Main of all the facts, or sufficient facts to put plaintiffs on inquiry. There has been complete disclosures made to him by the defendant, and everything that the defendant did was with Main's acquiescence and previous knowledge, and whether or not Main communicated to plaintiffs is immaterial under the law.

If the plaintiffs were not satisfied with the statement to them in 1913, it became their bounden duty to call on their agent for particulars. The statement shows receipts, expenses and commissions. They were put upon notice as to each and

every item. Isaacs reported to the only person in the transaction he knew, their agent, the man with whom the transaction initiated and by whom it was concluded. The plaintiffs accepted the benefits of Main's acts, such as his contract with Isaacs for the \$18,100 guarantee. They cannot accept the benefits and repudiate the burdens. The plaintiffs also received from Main Mr. Isaacs' statement of account and retained the same without objection. They also received the amount of his bid of \$11,094. They availed themselves, through their agent, of Isaacs' services. They cannot disavow Main's acts whilst accepting and retaining the benefits of them.

Mr. Main's knowledge was plaintiffs' knowledge; his bargains were plaintiffs' bargains; his carelessness, if any, was plaintiffs' carelessness; his laches, if any, were plaintiffs' laches; his means of knowledge were plaintiffs' means of knowledge. Mr. Main was called as a witness by plaintiffs, and they are bound by his testimony. He stands unimpeached. We hasten to quote the following from his testimony, to show that the transactions originated with him:

“Q. What brought Mr. Isaacs to the scene of this fire? Did he come of his own volition, or was he sent for?

A. I sent for him. I think I either telephoned or telegraphed him.” (Tr. pp. 26-27.)

(4) Amendment Seeks to Excuse the Delay in Attacking the Sale in Bulk by the Only Allegation

“that knowledge of said sale to himself was not communicated to your complainants at any

time by said defendant and that they only became aware of the same *within ten days prior to the commencement of this action.*" (Amendment p. 1.)

In *Clapp v. Leavens*, 164 Fed. 321, the Circuit Court of Appeals said:

"It is argued that for that reason the statute did not begin to run until after such discovery. Such an allegation is insufficient. (Citing cases.) The mere ignorance of the plaintiff of his cause of action will not prevent the running of the statute. There must be some *concealment of facts* which ordinary diligence could not discover. In this case none are pleaded."

(The action was commenced February 23, 1916, and this bulk sale transaction was not questioned in the original bill. An amended bill was filed months later, and still the transaction is not attacked. The transaction was questioned for the first time on the 31st of January, 1917, when the amendment was presented, and this was an afterthought brought out by the exigencies of the case.)

Waiving these considerations for the moment, we insist that this allegation does not square up to the requirements of the law that the plaintiffs must show that by the exercise of ordinary diligence the discovery *might not have been sooner made*. Not a particle of evidence was introduced upon this subject. The proof shows, without contradiction, that the agent of plaintiffs had full *knowledge of all the facts as early as November, 1913*, and that as the representative of the plaintiffs he acquiesced in

every detail of the transaction. The amendment does not charge concealment, or any act of fraud on the part of defendant, nor does it show what the discovery was, and that by the exercise of ordinary diligence the *discovery might not have been sooner made*. There is not in the entire record an iota of proof of concealment, or act of fraud upon the part of defendant, and there is absolutely no evidence as to when they discovered that he had "credited himself" with twenty per cent commission. The amendment avoids all mention of this fact, and it is quite obvious that plaintiffs personally knew this fact in November, 1913, and the amendment admits that plaintiffs knew that in February, 1916, defendant had so credited himself with the commission of twenty per cent, and we find acquiescence and no objection or complaint until the very day of the trial of the cause. In speaking of this commission, Isaacs testified:

"I figured with him the amount of my commissions on both sales, retail and bulk, at 20%. He made no objection to that charge." (Tr. p. 153.)

He is not disputed by Mr. Geo. C. Main, who acted for the complainants, but is indeed corroborated. (Tr. p. 121.)

MAIN WAS MORE THAN A MERE ADJUSTER, AND HIS STATEMENT OF NOVEMBER, 1913, TO THE PLAINTIFFS, CONCLUSIVELY SHOWS THIS FACT.

There is nothing in *Mannheim v. Standard Insurance Co.*, 145 Pac. 992, which militates against our

position. Main was more than a mere adjuster. He was the agent of plaintiffs not only in the matter of adjusting the loss with the assured, but in purchasing the goods and in making the contract for their disposal. He rendered a statement to the company on November 26, 1913, in which his activities are shown, and no objection is made thereto, and his authority to have dealt with defendant concerning these matters remains absolutely unquestioned. The statement speaks of realizations on sales of goods; it mentions expenses. It specifically mentioned "net sales" \$28,901.92. It mentions, among other items, commission for handling at 20 per cent on \$28,901.92—\$5780.38.

Mr. Main positively knew, as shown by the undisputed testimony, that the amount \$28,901.92, was made up of the retail sale amounting to some \$17,000 and the sale in bulk to Mr. Isaacs, and that he had charged commissions therefor. He made no objection to this item, nor did the plaintiffs make any objection thereto until the trial of this cause, although admitting prior personal knowledge of the fact for at least one year. Main, however, communicated these facts to the plaintiffs at the time of their occurrence. The correspondence which plaintiffs declined to produce would have also shown this fact. But whether he did so or not, is immaterial. They are chargeable with his knowledge. Main's knowledge was plaintiffs' knowledge as of the date he received it.

It was said in *St. Paul Co. v. Pacific Storage Co.*, 157 Fed. 631:

“The agent of the insurance company knew just where the boats were. He was advised that it was thought best to remove the cargo overland, he knew the probable cost of moving each pound of cargo, and he acquiesced in the opinion that it was best to move it, rather than take the risk of a total loss by the breaking up of the ice in the spring.”

In *Stockton Works v. Glenn Insurance Co.*, 121 Cal. 180, the court said:

“I think the evidence shows quite clearly that Dogrman was acting for all the companies, at least in the adjustment of the loss after the fire. He was the local agent for several of the companies at Stockton, and to him was presented the proofs of loss by plaintiff, as agent of all the companies; his name is among those of the adjusters signed to their report; his name is attached to the agreement for the submission to arbitration, in which, with others, he assumes to represent all the companies.”

It is quite apparent that Main's authority was not limited merely to “ascertain and report the actual loss or damage by fire.”

EXHIBITS “C” AND “19” REFERRED TO ON PAGES 8 AND 172 OF APPELLANTS’ BRIEF, ARE MISLEADING.

These figures were entered as Bridge's inventory figures, and were entirely based on that inventory, with which Isaacs had nothing to do. The fact, however, is immaterial, as the goods had already

been purchased by the defendant with the knowledge and consent of plaintiffs' agent. They were his goods to do with as he pleased. If he paid \$11,094 for the goods, and expected to retail them, he would have to add to this cost 25 per cent for overhead expenses (the testimony shows this to be the usual expense allowed), interest on the money and reasonable profits. The testimony shows that many of the articles were sold *below* Bridge's inventory price. The testimony also conclusively shows that Isaacs paid a fair price for the goods, and that it was the highest price obtainable.

The plaintiffs' case completely failed in their attacks on the inadequacy of the price paid. This is shown not only by the testimony of Main, but by that of George Mason, plaintiffs' own witness—a disinterested witness:

“I consider \$11,000 a fair valuation of a stock, the other half of which sold at retail for \$17,800. This is just about the usual percentage of profit at a retail sale—not a fire sale.”
(Tr. p. 116.)

The testimony is exceedingly significant, as it shows the fallacy of counsel's theory on the inventory angle of the case and fairly demonstrates the fairness of the transaction on the part of the defendant.

The witness, J. O. Johnson, called by plaintiffs, testified as follows:

“To the best of my knowledge the goods were sold according to the sale prices on them for the fire sale. There was no stock sold at whole-

sale that I know of. To the best of my knowledge, it was all sold piece by piece over the counter at retail. The insurance sale apparently held up well during the three weeks and in my opinion was a successful sale.

I was employed by H. C. Seynei & Co. during the sale of the balance of the Bridge stock. As I remember the same prices were left on the goods. I was paid in cash, eighteen dollars a week." (Tr. p. 88.)

What is there left of counsel's case? Seynei and Jeremy.

It is a leading principle of law that when a contract is made by one assuming to act in behalf of corporations, and the corporations receive and retain the benefits of such act without objection, they thereby ratify the unauthorized act and estop themselves from repudiating it. In other words, the corporation cannot disaffirm so much of the unauthorized act as is onerous, while retaining so much of it as is beneficial; it cannot keep the advantages while repudiating the burden; it cannot disaffirm the contract while keeping the consideration. (*10 Cyc.* 1078.)

When the plaintiffs received Main's statement, they did not question his right to do any of the things therein referred to.

It is also a leading principle of law that as between a principal and a third person, that notice to an agent whose duty it is to act upon the information for his principal, or to communicate it to his principal, is notice to this principal. (*10 Cyc.* 1056.)

Main had knowledge of all the facts on the 26th of November, 1913, when the bill of complaint alleges that the statement therein contained was "rendered to the complainants".

ISAACS' STATEMENT TO MAIN OF NOVEMBER 26, 1913, WAS ACCOMPANIED BY A LETTER CONCLUDING WITH THE SENTENCE, "TRUSTING YOU WILL FIND THE SAME CORRECT AND SATISFACTORY", ETC.

This letter was received by Main on the same date and the statement was transmitted by Main to the complaining companies on December 18, 1913. Main in his letter to the companies states that the amount recovered is "net gain over what we were able to close the loss with the insured through their adjuster, Mr. Mason, and on the whole satisfactory". Not the slightest objection was made to that account until the complaint in this case was filed on the 10th day of May, 1916, and the complaint does not point out wherein the account was defective, the charge being made only that the expense items are excessive and the totals false and untrue. At the trial of the case Mr. Isaacs took up every single expense item, the rent, the lights, the advertising, clerk hire, materials, insurance, commission, advance guarantee, etc., and did it so thoroughly that counsel has been compelled to abandon the claim that the expense items were excessive. It was shown at the trial that all the dealings between the defendant and the plaintiffs from the very inception to their con-

clusion were had with their agent or adjuster, Mr. George C. Main. His authority to negotiate and receive and conclude was expressly recognized; not one word of complaint on the part of Mr. George C. Main has ever been uttered. He who was thoroughly familiar with the details of the transaction has verbally and in writing testified to their integrity. Mr. Main was advised of the sale in bulk to Mr. Isaacs. Isaacs' method of accounting was the same as had been used in previous cases. Shortness of notice to bidders was not exceptional or detrimental. Mr. Main considered the entire transaction fair, and has not changed his opinion. The plaintiffs received the statement rendered by Isaacs and retained it without change or objection; they retained the guarantee of \$18,100; they have retained the check for \$1049.81; they retained the benefit of defendant's services. If they ever had a remedy for their imaginary wrongs they failed to exercise it within the time allowed by law. Mr. Main knew the facts, he knew of the retail sale, he knew of the sale in bulk, he knew of the commission charged, his reports were accepted, his principals have remained idle and accepted the benefits and have not rescinded or at any time offered to rescind the transaction.

As the distinguished judge who tried this case points out, the claim against the defendant seems to be three fold, first, that his expense account is excessive; second, that he did not account for moneys received during the fire sale, and third, the

claim arising out of and by reason of the sale in bulk to Seynei himself. Speaking of these three claims, the court states "*the only testimony offered to impeach the expense account was the mere opinion of the witness Seynei that it seemed large. As against this, every item in the account seems to have been fairly and satisfactorily established*". Mr. Seynei was the chief witness for the complainants. Seynei was taken in by Isaacs after he had purchased the goods in bulk from the insurance companies. Seynei conducted the business for Isaacs after he had purchased the same from the insurance companies, and this same Seynei is the plaintiff in the suit of *Seynei v. Isaacs*. We are not familiar with this case, as we did not participate in the trial. This record only incidentally refers to that suit. It is not involved here at all in any way. Counsel invokes that decision in lieu of his proof in this case, just as he might invoke a decision in the Seattle \$100,000 suit if he should be successful there. We shall make no reference to the Seynei suit, the manner in which it was tried, or the reasons for the decision, as it has no place here. The defendant of course takes the ground that he was unjustly found against; that however, is a matter of no moment. We submit that he has accounted for every dollar taken on the retail sale, his expenses as well as his receipts, and there is not a particle of testimony to the contrary. We also submit that the sale in bulk to him was had with the approval of the complainants' agent, and they are estopped from complaining. We also contend that the evidence of the com-

plainants, itself conclusively establishes—that the amount paid by Isaacs \$11,000 for the goods in bulk, at the close of the retail sale, was a fair price. (See testimony of Mason, page 116; see testimony of Main, page 121). Main stating “I think it was a very good bid.” That there was no clandestine appropriation of merchandise as claimed, and we further assert that the whole case is broken down through lack of proof; that Mr. Isaacs has fully, freely and honestly accounted in open court. He has dealt frankly with the court in every particular. If he was not able to more technically account then he is not to blame, for the transaction occurred way back in 1913, and his accounting rendered at the time was accepted, and he is not to blame for the lapse of time in suing. Plaintiffs’ own laches prevent them from demanding things which cannot be produced. He accounted once and no objection was made thereto for three years.

In *Eichel v. Sawyer*, 44 Fed. 853, (involving commissions of factors) the court said:

“But whether they acknowledged the correctness of these accounts or not, when they received those accounts and did not in a reasonable time thereafter point out errors or deny their correctness, the law treats their silence as an admission of their correctness.”

And, as is said in *Porter v. Price*, 80 Fed. 656 (factor):

“But a man cannot be allowed to lay a rendered account aside, and afterwards merely upon saying that he did so trusting to the honesty

and accuracy of the other party, be allowed to attack it in respect to matters apparent upon reasonable examination of the items as stated on the face of the account."

In *Allen West Commission Co. v. Patillo*, 90 Fed. 629 (factor's commissions), the court said:

"A party charged may undoubtedly show errors and omissions apparent in the account, but the burden of showing them *is upon him who receives and keeps the account without objection*. The errors in the account must be specified. They will not be corrected on doubtful testimony. They must be made to clearly appear."

The defendant has established, clearly and satisfactorily these three propositions:

1. That his expense account was not excessive, he accounted indeed for every item charged as an expense;

2. That he has accounted for every dollar of the moneys received during the retail sale by the production of his original sales slips taken during the 19 retail sales days—sales slips turned in by the salesmen (some 40 or 50 in number) and by the production of his cash book and his bank book.

3. That he has accounted for the fairness of the sale in bulk to himself by the payment of \$11,000 to the complainants—by showing that such sale was had with the full knowledge, consent and approval of complainants' agent, George C. Main and was made only after defendant had received bids from other bidders, his being the highest. In a word,—he has accounted for this transaction by proving

that the plan was submitted to Mr. Main himself and was agreed on by him and further that the complainants received the benefits of the transaction with full knowledge of the facts.

His honor, Judge Rudkin, has thoroughly reviewed the facts and the law in his opinion, which we have made part of this brief.

In conclusion, we respectfully submit that there are not even suspicious circumstances against the defendant, and suspicious circumstances no matter how numerous are not sufficient on which to predicate a decree of fraud. (*Harvey v. Stowe*, 219 Federal Reporter, page 17.) The case here rests solely upon the unwarranted insinuations and gross exaggerations found throughout the 235 page brief filed by the counsel for the appellants.

Dated, San Francisco,
March 8, 1918.

Respectfully submitted,

BERT SCHLESINGER,

LEON E. PRESCOTT,

Attorneys for Appellee.

(APPENDIX FOLLOWS.)

Appendix.

We have annexed to this brief the opinion of Judge Rudkin and a tabulated statement based on facts and figures, which remain undisputed, and based principally upon the testimony of Mason and Main, witnesses for the plaintiffs.

This tabulation clearly demonstrates why Mr. Main wrote to the plaintiffs as follows:

“* * * However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory.”

Defendant's Exhibit “2 T”, Tr. p. 237.

The tabulation appearing in the Appendix to the brief of appellants is dated September 25, 1917, seven months after the trial of this case.

OPINION OF JUDGE RUDKIN.

“This is a suit in equity for an accounting.

On the 11th day of August, 1913, the plaintiffs were insurers in varying amounts aggregating \$21,000 in all, on a stock of merchandise in the City of Seattle owned by one Bridge, doing business under the name of A. Bridge & Co. On that date a fire occurred in the store building occupied by Bridge, causing a loss, the extent of which is a matter of dispute between the parties to the present controversy.

Soon after the loss occurred, Bridge made an assignment to one Truax, a representative of the Seattle National Bank, for the benefit of his creditors, and negotiations were entered upon for the adjustment of the loss. In the course of these negotiations the plaintiffs were represented by one Main, and the assured and his assignee by one Mason, as insurance adjusters. The adjuster representing the assured and the assignee claimed a loss of \$18,254.84 which was later reduced to \$17,000, and finally to \$16,200. The adjuster representing the plaintiffs conceded a loss of \$13,588.65, but refused to concede more. Being thus unable to agree upon the amount or extent of the loss, it was finally agreed between the assignee and the plaintiffs, that the sound value of the stock before the fire was \$34,300, and that the plaintiffs would take over the stock at that figure. At the same time, and as a part of the same transaction, it was agreed between Main and the defendant, that the

defendant would put up a guarantee of \$18,100 and sell the stock for the benefit of the plaintiffs, receiving for his services in that behalf a commission of twenty per cent on the gross amount realized on the sale. Pursuant to this arrangement, the defendant paid the guarantee of \$18,100 and the plaintiffs paid \$16,200, thus making up the sound value of \$34,300, and insuring the plaintiffs against any loss in excess of the \$16,200 claimed by the insured and his assignee.

Thereafter a fire sale was conducted by the defendant at the old Bridge stand for a period of nineteen days, exclusive of Sundays. The gross proceeds of this sale, as reported by the defendant, was approximately \$18,000. At the expiration of this nineteen-day period, the remainder of the stock was sold in bulk at private sale on sealed bids, ostensibly to one Seynei, but in reality to Seynei and the defendant, who had formed a co-partnership for the purpose of taking over the stock. The amount realized on this sale in bulk was approximately \$11,000.

After the latter sale, the fire sale was continued at the same stand by the defendant and Seynei for a period of about seven weeks, some new stock being added in the meantime.

On the 26th day of November, 1913, the defendant rendered the following statement to Main:

“Statement—Salvage of A. Bridge & Co.
Clothing, furniture, shoes, net sales \$28,901.92
Expenses.

Rent	920.00	
Light	66.88	
Advertising	1,204.21	
Clerk hire	1,655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling		
at 20% on \$28,901.92	5,780.38	
Advanced as guarantee	18,100.00	27,852.11
		<hr/>
		\$ 1,049.81”

and inclosed the same together with a check in the following letter:

“I inclose herewith a statement of A. Bridge & Co. salvage, together with check for \$1049.81, to cover the net proceeds.

Trusting you will find the same correct and satisfactory.”

On December 8, 1913, Main wrote to the plaintiffs, inclosing a copy of the report and stating:

“You will also find enclosed check covering this proportion. The total insurance on stock board was \$21,000. I am pleased that we are able to report a substantial salvage, although that is not as much as we had hoped for, but this is explained owing to the adverse conditions confronting Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through his adjuster, Mr. Mason, and on the whole, satisfactory.”

This money was retained by the plaintiffs, and nothing more was heard of the transaction until shortly before the institution of the present suit.

In the meantime, Seynei and the defendant became involved in litigation over their partnership affairs, and from certain disclosures made on the trial of that case, the plaintiffs concluded that they had been defrauded by the defendant, and demanded a further accounting. Such demand was not complied with, and the present suit followed.

Before discussing the facts, two preliminary questions of law should be disposed of. The plaintiffs contend, first, that Main as a mere insurance adjuster had no authority to represent or bind them; and second, that the burden is upon the defendant to render a full, true and correct account of his stewardship.

In support of the first proposition, my attention is directed to a provision of the Insurance Code of the State of Washington, defining the term "adjuster" or "insurance adjuster", and to a decision of the Supreme Court of the State, construing that statute. I find no fault with that decision. Of course, a mere adjuster has no authority, express or implied, to bind his principal. Like the ordinary claim agent, he can only investigate and report. But what are the facts here? Main employed the defendant, agreed upon his commission, agreed with the assignee of the insured to take over the stock of goods for \$34,300, consulted with the defendant as to the time and manner of sale, including the sale in bulk, and transmitted to the plaintiffs the statement of account

received from the defendant. Manifestly he did not do any or all of these things as a mere adjuster, and yet his authority in that regard has never been questioned, and is not now questioned by the plaintiffs. Like any other agent, the authority of an adjuster lies in contract and he has such authority as the principal expressly confers, and such as the principal knowingly permits him to exercise without protest or objection. Within this rule, it seems to me there can be no question, but that the acts of Main were the acts of the plaintiffs themselves, and that his knowledge was their knowledge. If such is not the case, the plaintiffs were not represented at all, for admittedly they had no dealings with the defendant, except through Main.

The second proposition advanced by the plaintiffs is, of course, sound. But here an account was rendered, and acquiesced in for more than two years without question or protest. Under such circumstances the rule is changed and the burden is shifted to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof.

Eichel v. Sawyer, 44 Fed. 853;

Porter v. Price, 80 Fed. 656;

Charlotte Oil & Fertilizer Co. v. Hartog,
85 Fed. 150;

Allen West Commission Co. v. Patello,
90 Fed. 629.

Now, what are the facts? The claim made by these plaintiffs is somewhat extravagant, to say

the least. Their printed brief opens with the statement:

“This is a case in equity, against the trustee by his *cestui que trust* for an accounting of a sixty thousand dollar trust fund in his hands, consisting of merchandise which has all been sold and disposed of by the trustee.”

The unusual claim on the part of the plaintiffs that they profited upwards of \$25,000 by this fire finds some support in the testimony of Bridge, Seynei, Jeremy, and perhaps others. Bridge has an action pending in the courts of the State of Washington against his assignee to recover damages in the sum of \$100,000 for sacrificing his property. Seynei, according to his testimony, conspired with the defendant to defraud the plaintiffs, and later quarreled with his partner in iniquity over the spoils. Jeremy assisted in the preparation of the false, fictitious inventory to the same end.

These witnesses testified that the damage caused by the fire was only nominal, and that the fire in fact added twenty-five per cent to the value of the stock. Such claim and such testimony do not appeal to me very strongly. The fact is not disputed that the assignee, for the benefit of the creditors, claimed a loss in the sum of \$16,200, and refused to accept an offer of upwards of \$13,000. The fact is not disputed that he was willing to accept \$34,300, as the sound value of the goods before the fire, which would, of course, include the value of the damaged stock and the claims against the plaintiffs. In his estimation,

therefore, the value of the damaged stock was about \$18,000, and other parties concerned did not differ widely upon that question.

The claim against the defendant is threefold. First, that his expense account is excessive; second, that he has not accounted for moneys received during the first sale; and third, the claim arising out of and by reason of the sale in bulk to Seynei and himself. The only testimony offered to impeach the expense account was the mere opinion of the witness, Seynei, that it seemed large. As against this, every item in the account seems to have been fairly and satisfactorily established. The claim that moneys received by the defendant during the fire sale have not been accounted for is sought to be established in this way: An inventory of the stock was taken immediately after the fire, showing the value to be approximately \$45,000 at cost price. A second inventory was taken at the close of the fire sale, showing the cost price of the balance of the stock to be approximately \$24,000. The first of these inventories was assumed to be correct without proof by all parties at the trial, and I do not understand that the correctness of the second inventory is impugned, aside from the claim that the cost price of some of the goods was marked down. A comparison of these two inventories shows, therefore, that the cost price of the goods sold during the nineteen days of the fire sale, was approximately \$20,000. Testimony was offered tending to show that these goods were sold at a considerable profit, probably twenty-five or

thirty-five per cent above the cost price. If such were the case, it would seem clear that the sum realized during this period should be several thousand dollars in excess of the \$18,000 reported by the defendant. As against this, the defendant produced at the trial several thousand sales slips, showing the sales made during this period, the goods sold, and the amount received therefor. The aggregate amount received as shown by these sales slips is within a few dollars of the amount reported by the defendant, and if we add to the last inventory the goods sold, as disclosed by the sales slips, we will have approximately the goods shown by the first inventory. The sales slips are not impeached and inasmuch as practically all of the goods have been accounted for, the claim that a much larger sum was received does not seem to find support in the testimony. The plaintiffs, therefore, have failed to show that the account as rendered by the defendant is incorrect up to the time of the sale in bulk.

It will readily be conceded, of course, that a sale by an agent to himself is voidable at the option of the principal, but it must likewise be conceded that he can sell to himself with the consent of his principal just as readily as the principal can sell to him. The fact is clearly established in this case, that the matter of this sale to the defendant was discussed before the sale, and was known to Main, and the latter testified upon the trial that he deemed the offer a fair one at that time, and was of the same opinion still. It

would seem idle therefore for the plaintiffs to claim that they can now set this sale aside after the lapse of more than three years. The utmost they can claim would be to call upon the defendant to account for the amount of his bid, namely, forty-five per cent of the cost price. There is some testimony before the court tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid; but for the reasons already stated, I am not prepared to say that fact has been established.

It seems to have been understood between the parties that the defendant was to have his commission on that sale as well as upon the others; and if the bid was put in to prevent a sacrifice, there would seem to be no injustice in allowing the commission. In any event, the fact that the commission was claimed and held out was known to Main, and through him to the plaintiffs, and no complaint was made by reason thereof.

After a full examination of the accounts, a competent expert for the defendant testified that he was unable to find any evidence of dishonesty. He candidly admitted, however, that the business methods of the defendant were crude, and his accounts abominable, and in that conclusion I fully agree. The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake.

The plaintiffs declare that this suit involves not merely the amount claimed, but the more important question, Are they at the mercy of their adjusters and salvors? I can only say in answer to this that the business of every corporation is transacted through agents, and its success will depend upon the fidelity of these agents and a proper supervision of the corporate affairs. And if these plaintiffs pursue in the future the course they have pursued in the past, the salvage end of their business will probably prove disastrous.

On the entire record I can find no basis upon which a decree can be given in favor of the plaintiffs for any item or any sum, and the bill is accordingly dismissed."

Gross realization sale of goods at retail.....	\$17,915.87
Gross realization sale of goods at wholesale..	11,094.00

TOTAL GROSS REALIZATION.....	29,009.87
------------------------------	-----------

Mason's claim of sound value.....	\$38,675.00
Mason's <i>first</i> claim of loss.....	18,254.84

Sound value of stock after fire..	20,420.16
Gross realization (as above)....	29,009.87

42%—Excess of realization over sound value	\$ 8,589.71
--	-------------

Mason's claim of sound value....	\$38,675.00
Mason's <i>second</i> claim of loss.....	17,000.00

Sound value of stock after fire..	21,675.00
Gross realization (as above)....	29,009.87

33.8%—Excess of realization over sound value	\$ 7,334.87
--	-------------

Mason's claim of sound value.....	\$38,675.00
Mason's <i>third</i> claim of loss.....	16,200.00

Sound value of stock after fire..	22,475.00
Gross realization (as above)....	29,009.87

29.2%—Excess of realization over sound value	\$ 6,534.87
--	-------------

Main's claim of sound value (1st).\$	35,393.40
Main's claim of loss.....	13,588.65

Sound value after fire.....	21,804.75
Gross realization (as above)....	29,009.87

33%—Excess of realization over sound value	\$ 7,205.12
--	-------------

Main's claim of sound value (2d).\$	34,300.00
Main's claim of loss.....	13,588.65

Sound value after fire....	20,711.35
Gross realization (as above)....	29,009.87

40%—Excess of realization over sound value	\$ 8,298.52
--	-------------

EXPENSE OF SALE.....	\$3,971.56
20% on \$29,009.87.....	5,801.97
	<u>\$9,773.53</u>

SOUND VALUE.	\$18,100.00
REALIZATION ...	29,009.87

60%—Excess of realization.....	10,909.87
EXPENSES.....	9,773.53
	<u>\$ 1,136.34</u>

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSUR-
ANCE COMPANY OF PITTSBURG, PA., SECUR-
ITY INSURANCE COMPANY OF NEW HAVEN,
Appellants,

VS.

DAVID ISAACS,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

BERT SCHLESINGER,

LEON E. PRESCOTT,

Attorneys for Appellee.

FILED

SEP 14 1918

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURG, PA., SECURITY
INSURANCE COMPANY OF NEW HAVEN,
Appellants,

VS.

DAVID ISAACS,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

We beg leave to submit to the court the following recent decisions to be added to the brief for appellee, at the end of the first paragraph on page 39:

A PRINCIPAL WHO ADOPTS THE ACT OF ONE PROFESSING TO ACT FOR HIM, MUST ADOPT IT IN TOTO, AND WILL NOT BE PERMITTED TO CLAIM THE BENEFIT ARISING THEREFROM, AND AT THE SAME TIME REPUDIATE THE BURDEN THEREOF.

In the recent case of *Public Savings Ins. Co. of America v. Greenwald* (Jan. 30, 1918), 118 N. E. 558, the court said:

“It is well settled that a principal may ratify the unauthorized acts of his agent, and when so ratified such acts become as binding upon the principal as they would have been, had such agent been duly authorized in the first instance. 2 C. J. 519; *Fouch v. Wilson* (1877), 59 Ind. 93; *United States etc. Co. v. Rawson* (1886), 106 Ind. 215, 6 N. E. 337; *Indiana etc. Co. v. Scribner*, 47 Ind. App. 621, 93 N. E. 1014; *Crumpacker v. Jeffrey*, 115 N. E. 62.

The finding of the court for appellee was a finding of every material fact essential to his right of recovery, whether based on original authority in such agent to make such settlement, or on appellant's ratification of his unauthorized act. If there is any evidence to sustain such decision, it is sufficient on appeal, although it may be strongly contradicted and not entirely satisfactory. (Citing cases.) In determining whether there is any such evidence, this court must consider not only that which may be said to be direct, but also all reasonable inferences which the trial court may have drawn from the established facts. (Citing cases.)

An examination of the evidence discloses that appellee was the only witness who testified as to the circumstances and terms of such settlement, which was in effect substantially as we have stated. After he had testified and rested his case in chief, appellant offered no evidence to contradict appellee's evidence in that regard, but called its president to testify regarding other matters, * * *

It is well settled that, where a person has it within his power to produce a witness, presumably favorably disposed toward him, to explain a transaction, and fails so do to, the presumption is that the testimony if produced, would be unfavorable to him. *Indiana etc. Co. v. Scribner*, *supra*. Under all the circumstances the trial court would have been justi-

fied in finding that the facts with reference to such settlement were correctly shown by the evidence of appellee, and further justified in drawing the inference that appellant had full knowledge thereof soon after such settlement was made.

It has been held that ratification means the adoption of that which was done for and in the name of another without authority; that it is a question of fact, and ordinarily may be inferred from the *conduct* of the parties, including silence with knowledge of the facts, and knowingly *accepting benefits from an unauthorized act; that such knowledge, like other facts, need not be proven by any particular kind or class of evidence, but may be inferred from facts and circumstances*; and that ratification by corporations may be proven in like manner. National Life Ins. Co. v. Headrick, 112 N. E. 559; Indiana etc. Co. v. Scribner, *supra*. It is a general rule of agency that a principal, who adopts the act of one professing to act for him, must adopt it in toto, *and will not be permitted to claim the benefit arising therefrom, and at the same time repudiate the burden thereof*. Adams Express Co. v. Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279; Cleveland etc. R. Co. v. Blind, 182 Ind. 398, 105 N. E. 483; Hunt v. Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964; Reeves & Co. v. Milier, 48 Ind. App. 339, 95 N. E. 677.

It is not claimed *that appellant has returned or offered to return any of the benefits it received from such settlement. Under such circumstances, and the rules stated, the trial court may have found that such settlement had been ratified, and by reason of such fact rendered judgment for appellee. There was substantial evidence tending to sustain such finding, and hence, under the well established rule, stated supra, we are bound thereby.*" (Italics ours.)

The evidence in the case at bar is conclusive that appellants have not offered to return any of the benefits received by them.

In the case of *Hudson v. Carlson*, (Jan. 2, 1918) 170 Pac. 102; the court said:

"The notes were sent by Oscar Nelson to appellant for his indorsement in order that the deal might be closed, and he indorsed them, receiving therefor the full amount of principal and interest then due upon the same. * * *

This was notice to appellant, her principal, and her consent to close the deal knowing this, coupled with the fact that appellant accepted the money and indorsed the notes, is sufficient to bind him. She was unquestionably acting within the apparent scope of her authority, and it is elementary that:

'As between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal holds the agent out as possessing or which he permits the agent to represent that he possesses and which the principal is estopped to deny.' 2 C. J. 570.

And likewise:

'The fact that the agent's apparent authority is different from the actual authority conferred does not relieve the principal of responsibility.' 2 C. J. 573."

Dated, San Francisco,
March 12, 1918.

Respectfully submitted,

BERT SCHLESINGER,

LEON E. PRESCOTT,

Attorneys for Appellee.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSUR-
ANCE COMPANY OF PITTSBURG, PA., SECURITY
INSURANCE COMPANY OF NEW HAVEN,
Appellants,

VS.

DAVID ISAACS,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

LEON E. PRESCOTT,

Russ Building, San Francisco,

BERT SCHLESINGER,

First National Bank Building, San Francisco,

*Counsel for Appellee
and Petitioner.*

FILED

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F. J. MURPHY

Table of Contents

	Page
1. Introduction: petitioner's justification.....	1
2. Appellant's knowledge, laches, bad faith and acquiescence	3
3. Preliminary points:	
1. Petition is by appellee, not by appellant....	11
2. Reversal was on fact, not law.....	11
(a) Authorities	12
4. Mr. Bailey's testimony.....	12
1. Bailey discounted by appellants.....	13
2. Bailey's interest	14
3. Bailey's reluctance	15
4. Bailey's weakness	15
5. Mr. Isaac's testimony	17
1. Mr. Isaacs corroborated by J. R. Mason...	19
2. Mr. Isaacs corroborated by G. C. Main.....	21
3. Mr. Isaacs corroborated by Lester Herrick.	22
4. Mr. Isaacs corroborated by J. O. Johnson..	22
5. Mr. Isaacs corroborated by Wm. J. Meyer.	23
6. Mr. Isaacs corroborated by the facts.....	23
6. Complainants' witnesses vitally interested.....	24
7. Legal principles assumed true.....	26
1. Main was the general agent of the complainants for this transaction.....	26
2. His acts bound complainants.....	26
3. His knowledge is imputed to complainants..	26
4. A sale by a trustee is not ipso facto void...	26
5. Such sale is binding on the principals if they, having knowledge of all material facts regarding same, acquiesce therein, and is not thereafter voidable on the ground of a subsequent discovery by them of facts which would not have altered their acquiescence had they known of such facts at the time.....	26

	Page
8. Analysis of Appellate Court's decision.....	26
1. Each of the six sets of facts upon which the Appellate Court based its finding that the bulk sale was fraudulent, is entirely free from fraud	26
2. Main, representing complainants, after full knowledge of all of these facts, satisfied the sale and accepted Mr. Isaacs' report, and thereafter each of complainants accepted their proportion of the money paid by Mr. Isaacs	33
9. Equity of the case.....	34
1. The amount involved.....	34
10. Findings of lower court are presumptively correct in absence of gross error.....	36
1. Authorities.	
11. Stigma should not be placed on this defendant in absence of clear proof of his fraud.....	40

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSUR-
ANCE COMPANY OF PITTSBURG, PA., SECURITY
INSURANCE COMPANY OF NEW HAVEN,

Appellants,

VS.

DAVID ISAACS,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The general credence ordinarily and properly given to the decisions of this court and the especial respect and high regard with which counsel for your petitioner has always viewed and been guided by those decisions, combine to make counsel

rather diffident in petitioning this court for a rehearing by it of this case. This diffidence arises in part from the fact that it has been counsel's observation that its opinions result from such thorough examination of the record and points involved that a rehearing only serves to reconvince the court of the propriety and correctness of its original decision.

Due consideration of these matters and of the vast amount of litigation now pending before this court, force counsel further to hesitate in bringing here a matter which this court has already considered and as to which it has stated its views.

However, this one proposition is patent: the very existence of such a remedy as "petition for rehearing", the necessity and advisability of which have been recognized by this court, presupposes the possibility of error, and affords the opportunity for this court to make the necessary correction where same is deemed consistent with the law and the equities of the case.

Furthermore, counsel suggests this justification for thus imposing on this court's time and patience: that at the original hearing of the case before this court, counsel inadvertently omitted to set forth certain matters which, by reason of the peculiar nature of this case not lending itself readily to an accurately true presentation by written record alone, were, we believe, not considered by this court in its decision, and which we further believe this court

would be inclined to entertain, on rehearing, favorably to the appellee, your petitioner.

**COMPLAINANTS' KNOWLEDGE, LACHES, BAD FAITH,
AND ACQUIESCENCE.**

At the very outset counsel desire to call to the court's attention a matter which we deem in itself more than sufficient to preclude these complainants from claiming in a court of equity that this bulk sale was fraudulent or void.

It is to be noted that this action was not commenced until the year 1916, whereas the bulk sale was concluded September 29, 1913; and, furthermore, that there was no complaint, in fact no mention even, of the bulk sale in the original bill of complaint filed, nor in the amended bill of complaint, and it was not until January 31st, 1917, (*during the trial*) when by an amendment to their amended bill of complaint these complainants set up their knowledge of the bulk sale and claimed it to be fraudulent and void. It is to be noted that the verification of this amendment, as also the verification of the bill of complaint, is made and signed by Jesse Olney, counsel for complainants, wherein the reason for this action is stated in these words: “* * * that the allegations of said amendment to the first amended bill of complaint are more within *my own knowledge* than of the officers of the said corporations complainant.” Signed “Jesse Olney” (Trans. p. 27). (All italics in this petition, ours.)

It follows from these facts, therefore, that in ascertaining whether there was laches or good faith it is very material to know at what period of time knowledge of this bulk sale was brought home to Mr. Olney, or to these complainants.

While there is no evidence in the record of this case as to when the incorporated complainants first learned of the sale in bulk to Mr. Isaacs, the record does show that Mr. Main knew of this sale at the time of its happening, and Mr. Main, it will be recalled, was the agent of the complainants for this transaction, and in fact the only person representing complainants with whom Mr. Isaacs dealt. It follows, therefore, by reason of the general principles of agency, that this knowledge must be imputed to these complainants as of that time, namely September, 1913. Can it be said with these facts in view that complaint of this sale first made on January 31, 1917, entitles these complainants to recover in a court of equity? This point will be discussed at length hereafter.

IN EQUITY CASE NO. 83, HARRY C. SEYNEI, PLAINTIFF, v. DAVID ISAACS, DEFENDANT, THE SAME COUNSEL FOR APPELLANT, HERE (MR. OLNEY) ASSISTED BY MR. BAILEY, AN ATTORNEY AND A WITNESS IN THIS CASE, PROCURED A DECISION ESTABLISHING THAT THE BULK SALE WAS VALID, AND THAT SEYNEI, HIS CHIEF WITNESS HERE, WAS ENTITLED TO ONE-HALF INTEREST THEREIN.

Inasmuch as the decision of the District Court of the United States in equity case No. 83, Harry C.

Seynei v. David Isaacs, has been repeatedly referred to by counsel for appellants (p. 138 appel. brief), we wish to call the court's attention to the bill of complaint filed in that case. Harry Seynei, as disclosed by the evidence, was a clerk in the employ of Mr. Bridge, the insolvent debtor and the insured. When Isaacs conceived the idea of purchasing the stock of goods he informed Mr. Main that he would engage Seynei, who was familiar with the trade; and later, in connection with the bulk sale, he informed Main that he, Isaacs, would bid on this stock himself *in the name of some other person* (Trans. p. 144). The business was thereafter conducted in the name of Seynei, so as to attract the trade with whom he was acquainted. Seynei did not invest one dollar in the enterprise. Subsequently differences arose between Seynei and Isaacs, and on June 4, 1914, Seynei filed a bill of complaint against Isaacs through Jesse Olney, his counsel and counsel for appellants in this case, in which former case he complained:

“That upon and from November 17th to said November 21, 1913, at Seattle, Washington, complainant and defendant engaged together in taking of an inventory of their mutual stock of goods of the said H. C. Seynei & Co. That they mutually inventoried said stock of goods at cost price in the sum of \$16,633.57.

That thereupon the defendant caused the said stock of goods of H. C. Seynei & Co. in its entirety to be transported to San Francisco, in the State of California, to be disposed of by him there for the benefit of the said business of H. C. Seynei & Co., said copartnership. That

since that date defendant has been engaged in the City of San Francisco, California, in the Northern District of California, in the sale of said stock of goods for the account of said firm and as trustee and agent of the complainant therein.”

This bill of complaint closes with the prayer:

“That the defendant David Isaacs may be decreed to be the trustee and agent of this plaintiff for and on account of the stock of goods and merchandise transported by him to San Francisco, Cal., and of all moneys received by him and bills receivable of H. C. Seynei & Co., heretofore above mentioned, from the beginning of said copartnership.”

This places Counsel Jesse Olney in the inconsistent and inequitable position of seeking, in the first action, to have Seynei declared half-owner of the stock on the theory that the bulk sale was *proper and valid*, and, in this action, attempting to convince the court that the *same sale* was utterly *void and fraudulent*. That this was the theory upon which Mr. Olney invoked the aid of equity in the first case is evident from the form of the interlocutory decree in that case, in which that court found and declared as part of such decree:

“That a partnership was formed on or before the 10th day of September, 1913, between the parties in this cause as partners for an equal interest in the partnership, *as stated in the bill of complaint*, which partnership has continued to the present time without change
* * *”

Reference has already been made to the complaint which discloses the inconsistency above pointed out.

After the decision in that case Counsellor Jesse Olney, on January 31, 1917, in this case charges under oath (Trans. pp. 26-27) :

“That said transfer (referring to the bulk sale) to himself by their trustee was a gross fraud and imposition upon your complainants, who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund, together with his profits thereon additional in such sum as the court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale.”

(Signed)

“Jesse Olney,
Solicitor and Counsel for
Complainants.”

In other words, when counsel appeared for Seynei he claimed Seynei owned a half interest in the goods; when he appears for complainants in this suit, of his own knowledge he states that those same goods belong to these complainants. Counsel for appellant placed the opinion in that case in the record here clearly for the purpose of prejudicing the court against Isaacs. It was produced before Judge Rudkin, but it failed to move him. Counsel for this defendant were not interested in that case, and we shall not discuss its merits or demerits. Should not, however, the decree and its satisfaction in that case prove the undoing of counsel for the appellant in this case?

Waiving for the moment counsel's position, what kind of accounting shall Mr. Isaacs be called upon to render? Decision in the first case was procured through the same counsel who appeared here establishing an ownership of the merchandise in question in Seynei and Isaacs; now he asks this court of equity in this suit that that decision be ignored, and that a new decree be rendered holding that these complainants are the owners. Will Mr. Seynei, his former client and *the main witness in this case*, account, and will counsel account? Will Mr. Isaacs who, by force of that decision, accounted to Seynei on the basis that the bulk sale was proper and valid, be forced to now account again to these complainants to his own loss on the basis that the bulk sale was fraudulent and void? Must he pay over twice? What is the status of this sale? What is Mr. Olney's position? Where is the equity of the case? Will Mr. Olney be permitted to manipulate the strings and juggle with the situation so that from one simple transaction in which these complainants had less than \$2000 invested, Counsellor Olney may in different equity courts stir up litigation involving nearly one hundred times that amount?

While this transaction is not referred to in Judge Rudkin's opinion, similar transactions are referred to in this remarkable suit (Trans. p. 38):

"The claim made by these plaintiffs is somewhat extravagant, to say the least. Their printed brief opens with the statement:

"This is a case in equity, against the trustee by his *cestui que trust* for an account-

ing of a *sixty thousand* dollar trust fund in his hands, consisting of merchandise which has all been sold and disposed of by the trustee.'

The *unusual claim* on the part of the plaintiffs that they profited upwards of \$25,000 by this fire, finds some support in the testimony of Bridge, Seynei, Jeremy, and perhaps others. Bridge has an action pending in the courts of the State of Washington against his assignee to recover damages in the sum of \$100,000 for sacrificing his property."

Bear in mind that these complainants are corporations—inanimate creations of the law, that it necessarily follows that by their knowledge is meant the knowledge of some agent representing them. Bear in mind that it is undisputed that Mr. Main was the agent of these complainant corporations. Bear in mind that as such agent, he alone represented these complainants in their dealings with Isaacs, and that Isaacs looked to him (Main) alone for his authority to act and as the sole person to whom he should and did communicate his activities. Bear in mind that *Main's good faith is not questioned*, that therefore his acts and knowledge are those of these complainants. Bear in mind that Main was completely apprised of all acts done by Isaacs including all details of this bulk sale. With these things in mind, can we escape the conclusion that this knowledge bound complainants and that they therefore are to be held to the knowledge of the bulk sale and by virtue of acquiescence therein for more than three years are bound thereby, and cannot now complain!

Overlook, if you will, the fact that, admitting they only learned of the bulk sale on February 13, 1916, complainants made no mention of it either in their original bill of complaint, filed February 23, 1916, nor in their amended bill of complaint, filed May 4, 1916.

But you cannot overlook the conclusion to be drawn from this chain of facts: that the bulk sale is first made an issue in this case by an amendment to the amended bill of complaint filed January 31, 1917, verified by Jesse Olney, counsel for complainants, because "the allegations of said amendment are more within my own knowledge than of the officers of the said corporations complainant"; that Jesse Olney was counsel for Seynei in a suit by him against Mr. Isaacs filed June 4, 1914, and that that suit was based on the bulk sale of the stock in question, *full information and knowledge of which sale counsellor Jesse Olney therefore must have had at that time, June 4, 1914.*

Have these complainants, therefore, any standing in a court of equity on the issue of the bulk sale by reason of the filing of an amendment to their bill of complaint on January 31, 1917, verified by their counsel, Jesse Olney, because "of my own knowledge" of the matters herein alleged?

Should the court not coincide with counsel's view that this one point alone justifies this petition and, in fact, an affirmance of the court below, we beg the indulgence of the court in presenting the remaining points in this petition.

There are two points which, as preliminary propositions, we desire to call to the court's attention.

THIS PETITION IS BY THE APPELLEE.

First, that this petition is by the appellee, not by an appellant,—the judgment of the lower court having, on appeal, been reversed. It is our belief that this court is more prone, in deference perhaps to the court below, with whose opinion the reversal shows it to have differed, to entertain and grant such a petition under these circumstances, than it might perhaps be where judgment on appeal were affirmed and a petition for rehearing filed by appellant. The tendency to extend greater latitude in those cases where appellee petitions for rehearing may also partially rest on this basis: that whereas appeal is the opportunity given appellant to relieve himself from judgment against him in the court below,—should he be successful in having such judgment reversed petition for rehearing is the opportunity given appellee to relieve himself from such judgment against him by the appellate court.

REVERSAL WAS ON FACTS, NOT LAW.

Second, that the decision of the appellate court reversing judgment of the court below, is grounded—not upon impregnable legal axioms which no number of rehearings could affect or change—but

upon certain *facts* of the case as disclosed by the testimony, to which testimony the appellate court affixed a different interpretation and significance than did the court below. We believe that this is a distinction of importance and that it is one favoring the granting of this petition for rehearing, for these reasons:

With all due deference to the appellate court, we submit that the trial court was in a far better situation than was the appellate court to judge as to the importance and the significance of the testimony. It had many of the witnesses before it. It could observe the demeanor and general appearance of each person testifying, and it is to be presumed that it coupled with the testimony given the manner in which that testimony was delivered, and judged accordingly.

Announcing a well known rule of law often recognized by this court, in *Meers & Dayton v. Childers*, 228 Fed. 640, the court said:

“We (the Circuit Court of Appeals) cannot * * * pass upon the credibility of any of the witnesses. The demeanor of witnesses necessarily has much to do with the question of their credibility.”

MR. BAILEY'S TESTIMONY.

That the trial court did not attach the same significance to the testimony of Bailey, as did the appellate court may well have been for reasons which did not, and necessarily by their very nature,

could not appear on the written record. While it may be true, as decided by the appellate court, that this testimony "bears upon its face every indication of truthfulness", it does not follow that the court below did not see other indications sufficient to justify that court in discounting the face value of the testimony. While this is not the place, nor is it the desire of counsel, to impeach Mr. Bailey as a witness, as an example of what we above set forth we beg to submit the following points regarding his testimony:

BAILEY DISCOUNTED BY APPELLANT.

It is a most significant commentary on the importance attached to Bailey's testimony at the trial, that counsel for appellant do little more than make casual reference to it in a brief of two hundred and seventy-three pages dealing in extenso with every possible point and argument from every conceivable angle and quoting fully any testimony deemed by counsel as useful in bolstering up appellant's case. With this in mind we note the brevity of the only reference to Bailey's testimony on the question of the bulk sale (Appellant's Brief, pp. 160-1):

"Mr. Bailey's testimony was that he was in the store at the time of the sale that Monday morning and heard two men complaining because they had not been given time to examine the stock, as they would like to have bid. He saw no bids. The time was too short for any prospective bidders to examine the stock.

‘Mr. Seynei told me he had got the stock but that he knew he would all the time. I knew Mr. Seynei expected to get the goods but I did not know how they were going to do it. I remarked that it would be a pretty good joke if someone else had come in at that moment, when they had agreed upon their partnership, and bid in the goods, that is put in a bid over Seynei; and Seynei laughed and said that could not very well happen. Mr. Isaacs knew what to bid and gave it to him to put it.’”

BAILEY'S INTEREST.

We call attention to this further testimony of Mr. Bailey (Trans. p. 103):

“I know Mr. Jesse Olney (counsel for appellant). I have had nothing *lately* in which *he was interested except* the case of H. C. Seynei versus the defendant in this case, that I know of. That action was prosecuted by *me* against the defendant on behalf of Mr. Seynei * * *.”

We urge that this was a very important *exception*. A further tendency to speak unfavorably to this defendant may be evinced from this testimony of Bailey (Trans. p. 106):

“I went to the store probably three or four times a week during the sale; *that was purely out of my friendship for Mr. Seynei* * * *.”

One cannot help but note in passing that it is at least most singular and unusual that Attorney Bailey should “purely out of my friendship for Mr. Seynei” consume so much of his valuable time wandering around the premises of this fire sale

so frequently. Surely this does not profit an attorney, unless the subsequent handling of litigation is obtained thereby.

BAILEY'S RELUCTANCE.

The record discloses further the following rather unwilling admissions which, while not as clear and forceful as is that part of Bailey's testimony directed *against* the interests of this defendant, is nevertheless pregnant with meaning (Trans. p. 102, 108):

“* * * I went down at that hour and was there when the bids (note, not *bid*) were opened
* * * I do not know whether there were other bids submitted for the goods. I *think* there was one or two others. I don't know that there was any competitive bidding but I *think so*.”

Throughout his testimony, Bailey testified in the most certain of terms as to matters which the court and even counsel for appellants were doubtful about, when such matters were adverse to this defendant. Is it not significant, therefore, that regarding this one matter of competitive bids as to which his knowledge is in *favor* of this defendant, Bailey forsakes his positive attitude of “I know” and substitutes “I think”?

BAILEY'S WEAKNESS.

Furthermore, a close analysis of the testimony itself tending to show the absence of competitive

bids will, we believe, disclose its own weakness. In this connection it is our contention that the closing of the bids before 3 P. M., the time stated in the advertisement, was material in this case only if it was shown that these complainants were injured thereby, and that a *possible* injury which *might* have resulted to complainants from the exclusion of a possible bidder who *might* have appeared if the bids were not closed so soon, and who *might* have made a bid which bid *might* have been in excess of the one presented by Seynei, is too remote to be considered. The testimony of Bailey is the only indication of any injury less remote than that immediately heretofore referred to. That testimony is as follows (Trans. p. 102):

“Two men whom I did not know were complaining to Mr. Seynei that they would like to have bid had they time to examine the goods before the bids were opened, but could not do it.”

As the strongest, in fact the only, evidence as to the most vital point in the case, this single sentence by a witness who unqualifiedly and positively and fully testified *against* the defendant as to all other matters, is a rather weak point on which to hang the argument that the bulk sale was fraudulent. Had there been anything else that the witness could have said in this regard, we are assured that counsel for appellants would have elicited the information.

In addition to its brevity, the following observations point to the worthlessness of this testimony as

showing lack of competition. It does not appear who these two men were; in fact Bailey, said to be a practicing attorney in Seattle, and said to be well acquainted with the merchants. "did not know" them. It does not appear that they made a bid, were in a position to make one, or if they had made one that it would have been in excess of the bid made by Seynei. It does not appear that they asked for an opportunity to make such a bid. It does not appear that they made any effort to examine the stock or to make a bid, but merely stood idly and loosely talking to Seynei. It does not appear, and this point is most significant, that it was too late for them to make a bid or that they would not have been allowed to do so had they really desired. From these propositions it follows that complainants were not injured by reason of the bids having been opened at 11 A. M., instead of at 3 P. M.

We earnestly apologize for consuming so much time in considering Mr. Bailey's testimony, but we believe this course is justified in view of the importance attached to this testimony by the appellate court.

MR. ISAACS' TESTIMONY.

At this time we call to the court's attention the fact that Mr. Isaacs' testimony was given in open court and that he was subjected to a rigid cross-examination. He produced the original slips of sale gotten up by 30 or 40 clerks at the time of the

transactions. He explained in detail the matter of the bulk sale to himself and testified that this sale to him was with the sanction and concurrence of complainants' agent,—Main. Mr. Main still remained in the employ of complainants as late as at the time of trial where his testimony corroborated in every detail the testimony of Mr. Isaacs; and let it be borne in mind that he (Main) had full knowledge of the transaction from its inception to its conclusion.

Let us also remind the court that Lester Herrick, an accountant of recognized standing in his profession, the man who was auditor in chief of the Panama Pacific International Exposition, testified that while Mr. Isaacs' accounting was crude it bore all evidence of honest intent and integrity; that he also explained that in the matter of a fire sale, a hurry up proposition, a scientific book-keeping would not be followed.

We find Isaacs accounting in open court in all matters occurring prior to the sale in bulk. He had accounted before by his statement of 1913, but he again accounted in open court at the time of trial. We do not understand that this accounting is questioned by this honorable court in its opinion. But if Isaacs is to be believed in the matter of the retail accounting what reason is there for this court to reject any part of his testimony?

Judge Rudkin believed Mr. Isaacs' version. Indeed, Isaacs was corroborated by the only witness who knew the facts,—agent Main. Attacking the

bulk sale, as we have shown, was clearly an after thought. The original complaint makes no mention of it. It is not mentioned until three years after the sale took place. The original complaint merely charged that he padded the expense account in the matter of rent, clerk hire, etc., and that his totals were false. These charges were shown to be absolutely unfounded, and then came the other attack. This latter attack, is, we believe, equally without merit.

It is perhaps not irrelevant to inquire whether the fact that the prior case of *Seynei v. Isaacs*, conducted by counsellor Olney on behalf of Mr. Seynei, was predicated upon the theory that this bulk sale was proper and valid, accounts for the circumstances that this bulk sale was not attacked as fraudulent and void until January 31, 1917. Here we have two inconsistent adjudications, both obtained at the behest of counsel for appellants, one that the bulk sale was valid, in which he obtained a decision and a collection for several thousands of dollars, and the other that the same bulk sale was fraudulent and void. It suggests itself that this is the reason why the attack on the bulk sale was not made until the late date of January 31, 1917. Is this such a reason as appeals to a court of equity as accounting for the delay in setting up an alleged fraud after three years knowledge and acquiescence?

MR. ISAACS CORROBORATED BY J. R. MASON.

J. R. Mason was a witness for complainants and was employed by Bridge's assignee to adjudge

Bridge's loss after the fire. He testified on cross-examination:

"I considered 45% a reasonable price for the remnants of that sale, if they were the average remnants, such as would follow a retail sale, all broken lines or badly damaged goods such as naturally would be left by buyers * * *." (Trans. p. 115)

(Note: Mr. Isaacs paid 45%.)

"Where a sale breaks down to a point where the cost is 50% to do business it would be advisable to hurry a sale in bulk through as quickly as possible. Any notice that would be sufficient to assemble a requisite number of responsible buyers and competitive bidders would be fair, and I would say that such sale was conducted under such circumstances as made it probable that as much had been realized as might have been if there had been a more extended advertisement in the newspaper." (Trans. p. 116)

On re-direct examination Mr. Mason testified:

"* * * If the balance of the stock sold in bulk was more than half the stock it could not all be remnants; of course the lines are broken. *I considered \$11,000 a fair valuation of a stock the other half of which sold at retail for \$17,800.*" (Trans. p. 116)

(Note: Mr. Isaacs paid \$11,094 for the bulk stock.)

(That the retail sale was not fraudulent is shown by the fact that sale slips were produced by from thirty to forty clerks, and a conspiracy between all of these clerks would have been necessary in order

to have carried out such a fraudulent scheme. 'These sale slips were examined in open court by Accountant George T. Klink, for the complainants, and by Accountant Lester Herrick for the defendant, and found to bear no ear marks of fraud.)

Mason, continuing, testified:

"An advertisement in a newspaper does not reach the Portland and San Francisco buyers; local buyers know all about it anyway. Where a stock is turned over to a salvage man for sale, either under a guarantee or commission, my experience is that the expectations of the Insurance Company are very disappointing." (Trans. p. 117)

MR. ISAACS CORROBORATED BY GEORGE C. MAIN.

George C. Main, called for complainants, further corroborated Mr. Isaacs as follows:

"I did not consider there was an opportunity to obtain more than defendants guarantee and expenses. I was free to drive a better bargain if I thought I could make one. In my opinion it was a fair proposition. * * * A salvage man does not always make a profit above his guarantee and I have known where a deficit was reported." (Trans. p. 119)

"* * * He (Mr. Isaacs) made his final report to the complainants through me in the latter part of November, 1913." (Trans. p. 120)

"After his statement was received I saw him numerous times but never signified any desire for a more detailed account of the receipts and disbursements in connection with the retail sale. * * * (Trans, p. 120) I told him, however, that if it were put up at sealed

bids it could go at a very low figure. * * * He said substantially that he would see that we were protected on that proposition; that he would put in a bid in his own behalf at a figure which he thought would represent the fair value of the assets as they then stood and that if any other bid came along that was higher than his the other party was welcome to it, because it would mean that the stock would bring all it was worth. There was nothing in this plan as he outlined it to me that I thought was objectionable. I understood after the sale in bulk what he paid for it. I knew because I knew the amount of the inventory and his bid was something about \$11,000, which was 40 or 45% of the invoice, the original invoice price of the goods. I thought at the time it was a very good bid. Looking at it now it seems we might have done better." (Trans. p. 121)

MR. ISAACS CORROBORATED BY LESTER HERRICK.

Lester Herrick testified, with reference to the retail sale, that:

"These slips bear serial numbers but not one complete series; they bear the numbers appearing in the various books. These sale slips appear, so far as I could determine, to have been made in the due and regular course of business. They do not bear any evidence or ear marks or changes, obliterations or alterations to any extent that would cause any suspicion." (Trans. p. 132)

MR. ISAACS CORROBORATED BY J. O. JOHNSON.

J. O. Johnson, a witness called for the complainants, corroborated Mr. Isaacs. Mr. Johnson was a salesman. He testified that

“After the sale had stopped the sizes were pretty well broken, all sold down. All the clothing was exposed to sale.” (Trans. p. 88)

MR. ISAACS CORROBORATED BY WILLIAM J. MEYER.

William J. Meyer, another salesman, called by the complainants, corroborated Mr. Isaacs. He testified in part as follows:

“I said it was a successful sale because lots of people came in and went out, having made purchases. I have known of sales where great crowds of people have come to purchase and yet it was perhaps a loss in the end. Not having the figures I cannot state whether or not the sale was a success. After the fire sale had stopped and before the place was opened up under the name of Seynei, new goods came into the store and improved the stock.” (Trans. p. 91)

MR. ISAACS CORROBORATED BY THE FACTS.

That Mr. Isaacs acted in all good faith as to the bulk sale is further evidenced by the testimony showing that there was a genuine competitive sale; that it was advertised; that Mr. Bailey knew about it; that Mr. Isaacs made no secret about it, and that genuine bids were put in by others.

Wasserman & Schermer bid 25%.

Colsky bid \$4200.

Cone bid between 25% and 30%.

Kessler's bid was 30%.

Buttnick bid between 25% and 30%.

Brenner Bros. of Bellingham, Washington, made an offer of \$10,000 conditioned that they could get the premises for continuing the sale (Trans. p. 144).

This last bid could not be considered, of course, by reason of the condition attached thereto. However, even were it accepted and the goods sold to this bidder, these complainants would have received only \$8000 net, Mr. Isaacs being clearly entitled to his 20% commission on this sale. By the sale to himself, Isaacs secured for complainants an additional \$875.

With the amounts of the above bids in mind, it will be recalled that in authorizing the sale on behalf of complainants, agent Main stated that he did not believe that more than 30% would be offered. Surely there cannot now be a complaint that Mr. Isaacs offered and paid 45%.

COMPLAINANTS' WITNESSES VITALLY INTERESTED.

In viewing the testimony of Mr. Bridge it should be borne in mind that he was the original owner and storekeeper, that he had lost his standing and his credit, and it must have galled him to see a third party engaged in the sale of his former stock. It will be recalled that he was forced to make an assignment for the benefit of his creditors and his mental state may well be judged by the fact that he had started suit for \$100,000 against his assignee.

Harry Seynei was more than usually embittered against Mr. Isaacs and his hostile attitude and desire to prejudice this defendant are most apparent from his testimony, all of which are elements vitally necessary to be considered. This erstwhile small-salaried sales-clerk who had been employed by Isaacs, given work and remuneration therefor, placed in a responsible position and given charge of the sale of this stock, and later, without an investment by him (Seynei) of a single dollar, given an interest in Mr. Isaacs' business,—in gracious return for these bounties conferred upon him by Mr. Isaacs, falls out with him and sued him for several thousands of dollars and at the trial of this case gives testimony of such color and in such an attitude that His Honor, Judge Rudkin very properly said (Tr. p. 38):

“Seynei, according to his testimony, conspired with the defendants to defraud the plaintiff, and later quarreled with his partner in iniquity over the spoils. * * * These witnesses testified that the damage caused by the fire was only nominal, and that the fire in fact added 25% to the value of the stock. *Such claim and such testimony do not appeal to me very strongly.*”

Mr. Bailey's interest we have in an earlier part of this petition fully considered. Suffice here to note that by reason of his employment as attorney for Mr. Seynei and his association with Mr. Olney in the case of Seynei v. Isaacs, Mr. Bailey is vitally interested in the losses and gains of Mr. Seynei.

I shall not again refer to the testimony of Mr. Isaacs, but I shall ask the court if it will please again examine it in the light of the presumption of innocence (Trans. pp. 142-160).

LEGAL PRINCIPLES INVOLVED.

For the purpose of this petition, we assume the following five propositions to be true and incontestably established:

- (1) Main was the general agent of these complainants, for this transaction.
 - (2) His acts bound complainants.
 - (3) His knowledge is imputed to complainants.
 - (4) A sale by the trustee to himself of the trust property, is not ipso facto void.
 - (5) Such a sale is binding on the principles if they, having knowledge of all material facts regarding thereto, acquiesce therein, and is not thereafter voidable on the ground of a subsequent discovery by them of facts which would not have altered their acquiescence had they known of such facts at the time.
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THE APPELLATE COURT'S DECISION.

Turning now to the decision of the appellate court, we find that it leaves uncontradicted everything established by the judgment of the court be-

low, save and excepting as to the sale in bulk. On this question the appellate court's finding reverses the court below and holds the bulk sale to be grossly fraudulent and void. Analysis of the decision shows that the court based its opinion that there was fraud on the following six propositions of fact:

- (1) That Isaacs represented that the sales decreased from day to day running down as low as \$400 to \$500 a day, the average daily expenses being over \$200.
- (2) That Isaacs sold the stock in bulk at 11 A. M. instead of waiting until 3 P. M. in accordance with the advertisement of the sale.
- (3) That he sold the property for 2% less than his own written bid and deducted 20% before paying the balance to complainants.
- (4) That he made a written list admitting the value of this property to be \$24,603.39.
- (5) That his testimony as to there being competing bids is refuted by five of his clerks and by Bailey.
- (6) That he put the advertisement of the sale under a fictitious name and for one day only.

We believe these six propositions with the conclusion drawn therefrom that the bulk sale was fraudulent and void, and a statement of the facts of the case, constitute the entire opinion of the

appellate court. It will readily be seen that there is no contravention of any of the legal principles advanced on behalf of defendant and sustained by the court below. The judgment of that court was reversed on the sole ground that the appellate court deemed that these six admittedly true statements of fact constituted fraud, whereas these same facts as viewed and interpreted by the court below were held by it not to constitute fraud. Where a reversal is thus had by reason of the appellate court interpreting facts differently than did the trial court and adversely to appellee, it may well be that such action is at least partially the result of counsel's for the appellee inability to point out to the appellate court the propositions and circumstances upon which the court below rested its opinion. Wherefore, we earnestly request the granting of this petition so that counsel, now by reason of the decision, acquainted with the appellate court's view in the premises, may have an opportunity of presenting their views supporting the lower court's interpretation of these facts.

We urge the following in support of our interpretation of each of the above six propositions, and for the purpose of clarity herewith present each one separately:

- (1) **That Isaacs Represented that the Sales Decreased From Day to Day, Running Down as low as \$400 to \$500 a Day, the Average Daily Expenses Being Over \$200.**

A review of the evidence shows that, far from any of these statements being fraudulent or mis-

carrying, to the contrary each portion is supported by competent testimony. Clear proof of the decrease of business is furnished by the fact that the force of clerks was reduced from 35 to 15 (Trans. p. 51; testimony of H. C. Seynei):

“The first day of that insurance sale there were 30 or 35 clerks employed. Toward the end of the sale these were reduced to about 15 in all.”

Receipts for the third week of the sale were \$300 less than the preceding week, but the most vital indication of all was the drop in the sale on Saturday, September 27. The sale on Saturday was a splendid indication by which to judge the balance of the week, and if, as Mr. Isaacs, experienced as to these various matters, was justified in predicting, the drop in the week corresponded to the drop on Saturday, which was a forty per cent decrease on sales, a continuing of the sale even one day more would have been at a large loss to these complainants. It must be borne in mind that a fire sale is at most a transient affair. It soon loses its glamor and appeal for the public, its strongest appeal resulting from its being conducted immediately after the conflagration. When that event recedes into the past, the sale loses its potency, and some new item of interest must be added, which was here done, namely, the transfer of the stock to Seynei, the adding of new stock and the commencement of a new enterprise, as to all of which these complainants would not be interested, their business being insurance, not merchandise.

What Mr. Isaacs said as to the expenses was mathematically correct. The total expenses for nineteen days were \$27,852.11. From this amount are to be subtracted \$5,780.38 for commissions, and \$18,100 advanced as guarantee, which leaves a total running expense for nineteen days of \$3,-971.73, or a daily running expense of \$209.

(2) That Mr. Isaacs Sold the Stock in Bulk at 11 A. M., Instead of Waiting Until 3 P. M. in Accordance With the Advertisement of Sale.

There can be no dispute that by the fraud referred to by the court is meant fraud practiced against these complainants by this defendant. It follows, therefore, that the above stated fact, (2) is not such an element of fraud as will avoid this sale unless the complainants were injured by this act of the defendant. For reasons stated at length in the early part of this petition, there was no injury to complainants, except, possibly, some conjectural injury predicated upon all sorts of contingencies too remote to be here considered.

(3) That He Sold the Property for 2% Less Than His Own Written Bid and Deducted 20% Before Paying the Balance to Complainants.

The 2% difference now becomes immaterial, in view of the fact that there was not a formal sale with strict terms as to sealed bids, that this bid was by himself, that he was under no obligation to complainants to be bound by any bids, and that his 45c bid was far in excess of any offer made by

others, and further that the 47c bid was merely placed as a formality in protection of complainants, as stated by Mr. Isaacs to Mr. Main.

As to the deduction of the 20% commission, this Mr. Isaacs was justly entitled to by the terms of his agreement with the complainants. Had the bulk sale been made to a third person for, say, \$10,000, it could not be disputed that Mr. Isaacs would have been entitled to \$2000 commission. That he was himself the purchaser cannot change the fact that he was entitled to a 20% commission on any sale made.

(4) That He Made a Written List Admitting the Value of This Property to be \$24,603.39.

While the court does not state its purpose in alluding to this point, it is intimated that this looks to the gross inadequacy of consideration. It is not a proper basis, however, of determining the value of second hand stock to look either to the original cost price nor to the proceeds of any subsequent retail sale of such stock. It must be borne in mind that these complainants are insurance companies, and are not engaged in a mercantile undertaking for profit as that is ordinarily understood, but seek only to recover their loss. Were they offered a mercantile stock inventoried at \$24,603.39 for which they would have to pay \$8876, conduct a seven weeks' retail sale, invest an additional \$6000 in new stock to supplement the other, close the sale, box the goods remaining, ship them to San Francisco,

and conduct a sale of it there, obtain someone to manage said business and clerks to carry on the sale, assume all the expenses incurred in these transactions, and risk the chances and losses involved,—we are prepared to say unqualifiedly that they would reject such a proposition. This is what Mr. Isaacs did. In view thereof it can not be said that he acted fraudulently or paid an inadequate amount when he relieved complainants from such a situation by buying this bulk stock and paying therefor \$8876 net to complainants.

(5) That His Testimony as to there Being Competing Bids Is Refuted by His Clerks and by Mr. Bailey.

Mr. Bailey's testimony has been fully dealt with heretofore. As to the clerks, it does not appear that any of them were in a position to know whether there were any bids or not. They testified merely that they saw none,—not that there were none.

(6) That He Put the Advertisement of the Sale Under a Fictitious Name, and for one Day Only.

It cannot be seriously claimed by reason of the fact that this advertisement was placed under the name of Coast Fire and Marine Insurance Co., D. Isaacs, manager, that any injury was thereby incurred by complainants, or any fraud practiced on them by this defendant. Nor does it appear that any injury resulted to complainants by reason of the advertisement being placed for one day only. The only testimony in the case as to the probable result of such sale is that of these complainants'

agent, Main, who gave it as his opinion that the sale would bring only 30% at the highest, *and with this belief he authorized the sale on behalf of complainants.* As Mr. Isaacs' bid far exceeded this amount, complainants cannot be heard to say that they were injured thereby, even had there been no advertisement of the sale. In this connection we note Mr. Main's testimony (Trans. p. 122):

"Ordinarily one day's notice of a sale is not customary and seems to me short and would tend to cut out competition if the bidders had not been notified in advance. There are several buyers right here where considerable competition is quickly obtained in the sale of large stocks of merchandise and ready on short notice to examine a stock, figure on and bid for it. I have heard that Colsky, Buttnick & Westerman and Schermer put in bids. I thought at the time such notice was fair to complainants and sufficient, and I have not changed my opinion on that."

COMPLAINANTS' KNOWLEDGE AND ACQUIESCENCE.

Moreover, it must be recalled (and this single fact alone, we believe, concludes complainants from ever complaining) these complainants, through Mr. Main, their agent, *after* having complete information as to each of the above six propositions, agreed to the sale, ratified the action taken by Mr. Isaacs, accepted his report, and retained the money paid to them by him, making no objection or protest of any kind until the time of the commencement of this action.

MAIN'S ACTS BOUND COMPLAINANTS.

In this connection it must be borne in mind (and we here mention and amphasize this point only because of the unwarranted inuendos contained in appellants' brief insinuating to the contrary) that there is no evidence to sustain the charge that Mr. Main was colluding with Mr. Isaacs, or that he acted in any way other than strictly in conformity with that ultra good faith and fidelity demanded of an agent in order that his acts and his knowledge may bind his principals; and it is therefore to be conceded without argument that Mr. Main did so conduct himself, and that, therefore, his principals, these complainants, were bound by his acts and his knowledge. That these complainants were thoroughly satisfied with Mr. Main's work for them, and remained so satisfied even at the time this action was commenced, is evidenced by the undisputed testimony of Mr. Main that

"I have been an adjuster for twenty-five years, and have done a great deal of adjusting for the complainants *and am still doing work for them.*" (Trans. p. 122)

THE AMOUNT INVOLVED.

At this point, we respectfully call the court's attention to the equity of the case as it presents itself to counsel.

The original cost price of the entire stock as it stood immediately before the fire, as per the Bridge

inventory conceded by all to be correct, was \$45,000. *The actual value* of this stock may well be judged from the fact that Bridge's assignee, the vice-president of the First National Bank of Seattle, parted with it for \$18,000, this being the amount claimed by him as above the loss sustained by the fire. He has been sued for \$100,000 damages by Mr. Bridge. That \$18,000 was not an undervaluation is evidenced by the fact that the complainants here only consented to pay this amount with great reluctance, after lengthy and disputed negotiations, and after they had received Isaacs' guarantee of \$18,000 which thus protected them within \$2000 of the \$14,000 they were willing to pay Bridge in order to satisfy their liability to him under his insurance policies without having anything to do with the stock.

This means that their investment in the entire transaction was less than \$2000 of which amount they in fact realized over half. In return for the small loss they sustained over and above what they were originally willing to pay Bridge, they received in return (1) an end of the disputes and negotiations with Bridge, (2) cancellation of their liability under their policies, and (3) avoidance of litigation with a possibility of their having to pay the \$16,200 finally claimed by Bridge as his loss, which was an amount greater by \$1,049 than the net amount they had to pay by reason of their dealings with Mr. Isaacs.

In other words, had these complainants not dealt with Mr. Isaacs, and Mr. Bridge or his assignee

established his right to the amount claimed as loss, these complainants would have lost an additional \$1,049 plus the expenses of the negotiations and the costs of litigation. Through the work of Mr. Isaacs they avoided this loss, and that they were entirely satisfied is conclusively established by their acquiescence in the transaction for such a long period of time.

Mr. Isaacs' investment, on the other hand, was \$18,000, the whole or any part of which he risked a chance of losing. He had no guarantee that the sale would bring this amount, nor that someone else in the city might not have another fire-sale and ruin his opportunity for profit, nor that any contingency might not arise and prevent his making the sale a success. Mr. Main, an experienced insurance adjuster, testified on this point (Trans. p. 119):

“A salvage man does not always make a profit above his guarantee and I have known where a deficit was reported.”

REVERSAL ON APPEAL.

We respectfully urge that the decision of the appellate court is not merely a departure from the well settled rule that where the evidence in the court below is conflicting as to a particular fact, the appellate court will not disturb a finding based on such evidence in the absence of gross error, but that it sets a precedent for a dangerous doctrine by which in future cases appellate court deci-

sions may overturn findings of fact made on the basis of materially conflicting evidence by the court below. Furthermore, does it not make of the appellate court a trial court if this court may say that one witness shall be believed and not another?

We beg leave to set before this court the following authorities:

In the case of *Thorndyke v. Alaska Perseverance Mining Co.*, 164 Fed. 657, it is said:

“Whatever conflict there is in the evidence was resolved against the plaintiff by the judge of the court below whose findings are in cases like the present always to be taken as presumptively correct and unless an obvious error has intervened in the application of the law or some serious or important mistake has been made in the consideration of the evidence the findings should not be disturbed.”

And to the same effect is *Wilson v. Sands et al.*, 231 Fed. 921, a bill in equity to rescind a contract of settlement on the ground of misrepresentation and fraud.

To the same effect is the case of *De Laval Separator Co. v. Iowa Dairy Separator Co.*, 194 Fed. 423.

Of especial import is the decision in *Tobey v. Kilbourne*, 222 Fed. 760, to this effect:

“The court below upon the evidence found that the appellees were not parties to the fraud.
* * * It is the established rule that the findings of the trial court in a suit in equity must be taken as presumptively correct and that unless an obvious error has intervened in the

application of the law or some serious or important mistake has been made in the consideration of the evidence the findings will not be disturbed by the appellate court. This rule is especially applicable in a case in which as here the testimony was taken in open court where the trial court had the opportunity to observe the demeanor of the witnesses and their manner of testifying and the appellate court has before it only a condensed printed statement of the evidence as it is presented under the new equity rule."

The reluctance of the appellate court to disturb the findings of the lower court is thus clearly shown. While it may be true as the appellant contends that one conclusion may be drawn from the facts in evidence, the fact that the court below drew the other conclusion from those facts will in the absence of gross error lead the appellate court to leave that finding undisturbed.

So in the instant case while it may be true that from the six sets of facts referred to by the appellate court that court might have deduced fraud had it been sitting at the trial of the case, the fact remains that these facts did not come before it in the first instance but that the trial court which did hear the testimony came to the conclusion from these facts that there was no fraud and made its finding accordingly.

Assuming the strongest possible position for the appellants, can it be said in view of the established rule set out in the above cited cases that there was such a serious mistake or error in the

consideration of the evidence by the court below as would justify the appellate court in reversing the finding of the lower court?

**ACCOUNT STATED IN FIRE SALES REVIEWED IN McMANUS
v. SAWYER, 231 FED. 231, BY JUDGE LEARNED HAND.**

This is an interesting case to which we invite the court's attention, especially as it demonstrates what a fire sale really is, and how difficult it is to render an accounting arising from such a sale.

As bearing on allowances for smoke damages, the court said:

"The next exception of surcharge is to the items of the 20 pieces which were in the fourth loft, and which suffered a smoke damage, for which the plaintiff was allowed \$180.97, 30 per cent of their value. * * * The plaintiff was credited with the sum which had been obtained from these, together with the allowance for depreciation, and no question can be raised about them."

This means that a 70 per cent depreciation for smoke damage was allowed.

That a party will be bound by his acceptance of an account sent him is pointed out by the court as follows:

"From March, 1908, the parties had been in business together, and throughout all the time the 'accounts current' had been regularly sent, and there is no suggestion that they had been returned. On the contrary, the whole business had been done upon their basis without any complaint by the plaintiff. This estab-

lished the course of the business by mutual consent upon a footing which was entirely reasonable in itself. The credit is therefore allowed."

THE STIGMA PLACED ON ISAACS.

We respectfully urge that the decision of the appellate court casts a stigma upon this defendant's name and brands him with actual fraud in connection with his business dealings as an insurance salvage man, and renders it impossible for him to continue to gain the confidence and respect which he has commanded in the past fifteen years of his business activity. While short of a criminal conviction, its blasting effect could never be effaced by Mr. David Isaacs, a man 60 years of age, a father and grandfather, and we sincerely urge that in the absence of clear and unmistakable proof of the fraudulent dealings charged to him this defendant should be purged of the shame that a reversal of facts would bring to him.

In this connection, we desire to call to this court's attention and to discuss somewhat in detail a case which forcibly illustrates the very extreme reluctance with which this court will impute fraud to a person, a case in fact which shows the extreme length to which this court has gone in order to purge a defendant brought before it of the stigma of fraud, and a case with which counsel for this appellee is well acquainted by reason of his having represented the creditors (appellees) therein. The

case is *Harvey v. Stowe*, 219 Fed. 17. The suit was by the trustee in bankruptcy against the wife of the bankrupt, Harvey,—the main question in issue being whether a gift by the bankrupt to his wife was made at a time when he was insolvent and thus a fraud upon creditors and void. The United States District Court, after considering all the evidence, found that there was a fraud and the gift was declared void.

The Circuit Court of Appeals (Ninth Circuit), however, reversed this decree because it found that “a serious mistake had been made by the trial court”; and the following excerpts from the opinion will illustrate how repugnant it is to this court of equity to cast the stigma of fraud upon any of the parties before them and how broadly this court will construe evidence in order to remove that stigma of fraud.

“Concededly it is a strong circumstance against Mr. and Mrs. Harvey’s claim that Harvey should have carried this stock on his private books as if it were his own. * * * It is true that manifestly his books were not scientifically kept. * * * There are other entries in his books, however * * * which would seem to indicate that there might have been a mistake on his part * * *.”

Despite this “strong circumstance against” the parties, this court in that suit found that there was no fraud. Surely Mr. Isaacs’ books which were also “not scientifically kept” should not be any more strictly scanned especially in view of Mr. Herrick’s

testimony that "it appears to have been the intent of the defendant to keep an honest record and I see nothing indicating the contrary."

The decision in the Harvey case then points to another indication of fraud which it decides was given too much importance by the lower court, and the appellate court proceeds to explain the situation so as to negative fraud:

"Another thing which *seems to militate* against the accuracy of Mrs. Harvey's testimony is the fact that she first testified that she kept this stock in her safe deposit box * * *. But later she changed her testimony and affirmed that the stock was kept in her own private safe at her residence. *This was a matter about which she may have made a candid mistake.*

"Again, the memorandum of Mrs. Harvey touching the time when she received the stock *seems to discredit her.*"

Surely Mr. Isaacs' testimony which did not contain any such "*mistakes*" should be given equal credibility by an appellate court which did not view either witness, especially when it is considered that Isaacs' testimony is substantiated by other witnesses.

Turning again to the Harvey case, we find this in the opinion:

"* * * while the stock was carried on his private books as an asset of his own, we think it does not destroy the verity of his statement respecting the initial fact of endorsing and delivering the stock as a gift to her. We are

still bound to believe what *he* said as to that and what *his* wife said as to *it*.

“The further discrepancies in Mrs. Harvey’s narrative which have been heretofore noticed are of no greater moment than often happens with perfectly truthful and candid witnesses.”

Despite these suspicious circumstances, the court obviously took the same stand which we assume in this case and which we humbly ask this court to reassert here as it did in the Harvey case,—namely that in the absence of clear and unmistakable proof to the contrary it will not be found that any of the parties acted fraudulently or with intent to defraud.

Wherefore, with profound respect for the opinion of this court, but with regard alike for the welfare of this defendant and his family and for the ends of justice, counsel earnestly request a rehearing of this case.

Dated, San Francisco,

February 1, 1919.

LEON E. PRESCOTT,

BERT SCHLESINGER,

*Counsel for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehear-

ing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
February 1, 1919.

BERT SCHLESINGER,
*Of Counsel for Appellee
and Petitioner.*

No. 3105

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSUR-
ANCE COMPANY OF PITTSBURG, PA., SECUR-
ITY INSURANCE COMPANY OF NEW HAVEN,

Appellants,

VS.

DAVID ISAACS,

Appellee.

**APPELLANTS' MEMORANDUM AS TO APPELLEE'S
"SUPPLEMENTAL BRIEF".**

JESSE OLNEY,
Solicitor and Counsel for Appellants.

FILED
MAR 18 1914
U.S. CIR. CT. 9TH CIR.

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY,
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, INSURANCE COMPANY OF NORTH
AMERICA, NATIONAL UNION FIRE INSUR-
ANCE COMPANY OF PITTSBURG, PA., SECUR-
ITY INSURANCE COMPANY OF NEW HAVEN,
Appellants,

VS.

DAVID ISAACS,

Appellee.

APPELLANTS' MEMORANDUM AS TO APPELLEE'S "SUPPLEMENTAL BRIEF".

The record before your Honors reeks with fraud.

This trustee under the shrewd pilotage of his astute counsel is attempting to navigate this fraud safely through the rapids of this litigation. To this end nowhere in either of his briefs does he even refer to the load of fraud he is carrying or even make a pretense of answering a single charge of fraud in our brief or attempt to explain away this record bristling with the badges of his fraud on every page.

His frauds stand shamelessly naked and brazenly undenied before your Honors.

Now, with an effrontery almost unbelievable, he demands his flimsy technicalities shall be recognized; that everything else shall be cast aside; and that your Honors as Chancellors shall say—"The record convicts you of unconscionable frauds but equity has no remedy." No Court of Equity will do this; nor will equity aid a trustee who has assumed a position with reference to the trust fund which is antagonistic to his beneficiary (Appellants' Brief, pp. 255, 256).

I find a "Supplemental Brief" has been now filed by our trustee in an eleventh hour attempt to strengthen the weakness of his first pamphlet; and in the bolstering up process the dubious expedient of auto-suggestion is employed by continual references to the "agency" of Main, the adjuster. Counsel parades with much ostentation the elementary doctrine that a principal may ratify the unauthorized act of his agent:—thus overstepping, however, in his zeal, the major premise that before there can be any "unauthorized act of an agent", an "agency" must first be affirmatively proved to exist.

Further, also, of course, the "unauthorized act of an agent" must be an act at least within the extent of his "agency". In short he must be able to do some acts under it to permit a particular act to become "an unauthorized act".

The cases cited by counsel are at law wherein there was a total absence of fraud and no fiduciary relation,

and are not of equitable cognizance. They evidently arose in Justices Court as one is for a small balance on promissory note and another for \$55 on stated account.

The reason why your Honors should be asked to assist this trustee in a Federal equity suit by reason of such citations from law cases wherein the fiduciary relation and fraud are absent, is too obscure to be observed by ordinary mental vision.

Especially is this so in view of the equitable rule—seemingly unknown to opposing counsel—that one cannot claim the benefit of any contractual relation in agency while committing a tort (Appellants' Brief, p. 218).

The courteous and astute counsel's specious attempt to camouflage his client's fraud beyond your Honors' observation by employing the elementary doctrine of rescission of contract and the broad general rule of "agency" that a principal who accepts the act of one professing to act for him must adopt it in toto and will not be permitted to claim the benefit arising therefrom and at the same time repudiate the burden thereof, is commendable in zeal but unfortunate in application. This abstract proposition is of course unassailable but how does it apply here to the cause at bar?

This is not a case of rescission of contract. There is no rescission. There is but one cause of action pleaded and that is to require this defendant Isaacs to account fully for the property of the complainants which came into his hands (Appellants' Brief, p. 254).

They say we are rescinding the contract. We are not. We are affirming it. We are holding Isaacs very strictly to a full and true accounting under his contract, viz., to honestly sell our merchandise to the best possible advantage and for the best price possible without fraud, without concealment or misrepresentation, and without secret personal advantage or profit.

They say to do this we should return to our worthy trustee the \$1049.81 he paid us claiming that was all the balance he owed.

They admit we are entitled to that \$1049.81, so why return it when they themselves admit we are entitled to it? Nor do they deny we are fairly entitled to more, for their silence in regard to the frauds in depreciating the proceeds (especially the depreciation of the second inventory) is an admission.

If we are successful before your Honors—as certainly the record entitles us to be—we shall then get more. If we are unsuccessful, we still retain the amount which this trustee says we are entitled to.

Counsel seems throughout in his citation of authorities to have had some other case in mind rather than the one at bar.

The doctrine is so elementary its concise statement on pages 147 and 148 of Appellants' Brief seems quite sufficient.

Dated, San Francisco,
March 16, 1918.

JESSE OLNEY,
Solicitor and Counsel for Appellants.

No.

3106

United States
Circuit Court of Appeals 6
For the Ninth Circuit.

FRANK BEYER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.**

FILED

JAN 6 - 1918

F. D. BOWEN, CLERK

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK BEYER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.**

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	PAGE
Assignment of Errors.....	191
Certificate of Clerk to Record.....	236
Citation on Writ of Error.....	2
Demurrer to Indictment.....	13

EXHIBITS:

Defendants' B 1 and 2 (Envelope and Letter to Mrs. Grace Fabian from Grace Claire and Grace Fay).....	146
Government's 3 (Contract between Grace Clair and Owl Cafe).....	142
Plaintiff's 4 (Contract between Lela Cavell and Owl Cafe).....	155
Indictment	5
Instructions Given.....	173
Minutes of Trial.....	19
Names and Addresses of Attorneys.....	1
Order Allowing Writ of Error.....	226
Orders Extending Time to Present and File Bill of Exceptions.....	227
Orders Denying Motions for New Trial and in Arrest of Judgment and Minutes and Orders of Proceedings had on June 18, 1917.....	43
Order Overruling Demurrer.....	17
Petition for Writ of Error.....	188
Praecipe	230

	PAGE
Sentence and Judgment of Court.....	45
Stipulation That Owl Cafe Was Licensed Under Laws of Mexico.....	162
Supersedeas Bond of Defendant.....	232
TESTIMONY ON BEHALF OF GOVERN- MENT:	
Claxton, Sallie Margaret.....	62
Direct Examination.....	78
Cross-Examination	80
Redirect Examination.....	103
Covert, Grace.....	135
Cross-Examination	144
Delo, Henry W.....	158
Gershon, Dave.....	162
Morris, Barney.....	152
Cross-Examination	155
Parkes, Dick.....	158
Person, Alma.....	106
Direct Examination.....	107
Cross-Examination	126
Recross-Examination	134
Smith, Daisy.....	157
Cross-Examination	157
Willard, C. F.....	159
Cross-Examination	161
TESTIMONY ON BEHALF OF DEFEND- ANT:	
Borques, Francisco.....	163
Verdict (recorded).....	41
Verdict (filed).....	42
Writ of Error.....	3

Names and Addresses of Attorneys.

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For Defendant in Error United States of America:

ROBERT O'CONNOR, Esq., United States Attorney, and WILLIAM F. PALMER, Esq., Assistant United States Attorney, Federal Building, Los Angeles, California.

*In the District Court of the United States for the
Southern District of California Southern Division*
UNITED STATES OF AMERICA,

Plaintiff,

v.

WARREN FABIAN, DAN MALONE, and FRANK
BEYER,

Defendants.

No. 1176, Criminal

Citation on Writ of Error.

UNITED STATES OF AMERICA, SOUTHERN
DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION, ss.

To the United States of America, and to Albert
Schoonover, United States Attorney for the South-
ern District of California, Greeting:

You are hereby cited and admonished to be and ap-
pear before the United States Circuit Court of Appeals
for the Ninth Circuit, at San Francisco, California,
within thirty days from the date hereof, pursuant to a
Writ of Error filed in the clerk's office of the District
Court of the United States, for the Southern District
of California, Southern Division, wherein Frank Beyer
is plaintiff in error and you are the defendant in error,
to show cause, if any there by, why the judgment in
the said writ of error mentioned should not be cor-
rected and speedy justice should not be done to the
parties in that behalf.

Given under my hand, at Los Angeles, California, in
said district, this 19 day of June, 1917.

OSCAR A. TRIPPET,
United States District Judge, for the Southern District
of California.

[Endorsed]: No. 1176, Crim. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Warren Fabian, Dan Malone and Frank Beyer, defendants. Citation on writ of error (Frank Beyer). Received copy of the within citation this 19 day of June, 1917. W. F. Palmer, Asst. U. S. Atty. Filed Jun. 19, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Earl Rogers, Charles Scholz & Milton M. Cohen, 403 California Building, phone Broadway 2626, Los Angeles, Cal., attorneys for defendants.

*In the District Court of the United States for the
Southern District of California Southern Division*

UNITED STATES OF AMERICA,

Plaintiff,

v.

WARREN FABIAN, DAN MALONE, and FRANK
BEYER,

Defendants.

No. 1176, Criminal

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States, for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said District Court, before you, between Frank Beyer,

plaintiff in error, and the United States of America, defendant in error, a manifest error has happened to the great damage of said Frank Beyer, plaintiff in error, as by his complaint appears:

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same to the United States District Court of Appeals for the Ninth District, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals, may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 19th day of June, 1917.

(Seal)

WM. M. VAN DYKE,

Clerk of the United States District Court, Southern
District of California, Southern Division.

Allowed by:

OSCAR A. TRIPPET,

Judge.

[Endorsed]: No. 1176 Crim. In the United States District Court in and for the Southern District of California, Southern Division. United States of America,

plaintiff, vs. Warren Fabian, Dan Malone and Frank Beyer, defendants. Writ of error (Frank Beyer). Received copy of the within writ this 19 day of June, 1917. W. F. Palmer, Asst. U. S. Atty. Filed Jun. 19, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Earl Rogers, Charles Scholz & Milton M. Cohen, 403 California Building, phone Broadway 2626, Los Angeles, Cal., attorneys for defendants.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

At at stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and sixteen.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That Warren Fabian, Lawrence J. Chartran, Dan Malone and F. B. Beyer, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, and various and sundry other persons whose names are to the Grand Jurors unknown and not capable by reason of lack of information on the part of the Grand Jurors of being named in this indictment, hereinafter in this indictment called defendants, heretofore, to-wit: on or about the 1st day of January, in the year of our Lord

one thousand nine hundred and sixteen, in the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, and among themselves, to commit an offense against the United States of America, to-wit: to violate that Act entitled "An Act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls and for other purposes," of June 25, 1910 (36 Stats. at Large 825), and particularly section two of said act, in the following manner and particulars:

That is to say, that it was the purpose, object and agreement of the said defendants, and each of them, that they would knowingly transport and cause to be transported, in foreign commerce from the City of Los Angeles, State of California, and from various and sundry other cities in the United States of America, the names of said cities are to the Grand Jurors unknown, to the town of Mexicali, in the Republic of Mexico, certain women and girls, the names of said women and girls other than as herein stated in this indictment are to the Grand Jurors unknown, for the purpose of debauchery as hereinafter in this indictment stated and described, whereby said women and girls would be transported in foreign commerce for the purpose of debauchery, to-wit: for the purpose of acting as entertainers and chorus girls, that is to say, singing and dancing in a certain building in Mexicali, in the Republic of Mexico, which said building would be known as the Owl Cafe, and the ground floor of said

building where said women and girls would act as entertainers and chorus girls, as aforesaid, would consist of one large room with a certain space set aside for a dance hall and certain space set aside for a gambling hall and a certain space set aside for a bar where intoxicating liquors would be sold, and a certain space set aside for tables and chairs where intoxicating liquors would be drunk, and leading off from said ground floor of said building there would be two hallways on either side of which said hallways there would be small rooms commonly termed cribs, where various and sundry other women and girls, whose names are to the grand jurors unknown, would engage in the practice of prostitution, that is to say, would engage in sexual intercourse with men other than their husbands, and it would be a part of the duties of said women and girls aforesaid whom the said defendants so conspired to transport as aforesaid as entertainers in said Owl Cafe to sell intoxicating liquors to any and all persons who might desire to buy them, and said women and girls would receive a percentage of forty (40%) percent on all such intoxicating liquors which they might sell, and to dance with any and all persons who might want to dance with said women and girls, and the said women and girls so conspired to be transported as aforesaid, were to entertain and perform as such chorus girls in that part of said building set apart as aforesaid for the bar and gambling tables, and to there perform and entertain in the presence of any and all persons who should be in said place, and said girls were to solicit persons in said place. other than the inmates thereof, to buy and drink

liquors with the said chorus girls, such liquors to be drunk at tables provided in said place for said purpose, and said girls were to so solicit any and all persons coming into said place to so buy and drink liquor, and said solicitation was to be in the presence of any and all persons there at the time of said solicitation, and in the presence of said women then and there engaged in prostitution while said prostitutes were in said part of said place; and the said prostitutes would solicit in the place where said chorus girls were to be, and in their presence, men to go with said prostitutes to said cribs; and said prostitutes and inmates of said place would frequent said compartment thereof in which said chorus girls were to be and entertain, and there would drink intoxicating liquors and procure sales of intoxicating liquors to men congregated there, all in the place where said chorus girls were to so entertain and solicit and stay; and said place would be frequented at all hours of the day and night by men of low character who would congregate there, for the purpose of indulgence in intoxicating liquors; and dancing, and for the purpose of prostitution; and said chorus girls were to occupy said place and be exposed at all times when in the performance of their said duties there to the company and contact of all said men, and all said prostitutes who would be there congregated.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purpose thereof, the said Dan Malone, on or about the 20th day

of May, 1916, in the City of Los Angeles, State of California, did employ one Viola Davenport, to work as entertainer and chorus girl in the Owl Cafe at Mexicali, in the Republic of Mexico.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Warren Fabian, on or about the 13th day of April, 1916, did persuade, induce and entice one Lela Cavill to go from the City of Los Angeles, State of California, to the town of Mexicali, in the Republic of Mexico.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Dan Malone, on or about the 18th day of May, 1916, in the City of Los Angeles, did induce, entice and persuade one Alma Korst to go from the City of Los Angeles, State of California, to the town of Mexicali, in the Republic of Mexico, for the purpose of engaging in chorus work in the Owl Cafe in Mexicali, Mexico.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Warren Fabian, on or about the 24th

day of March, 1916, in the city of Los Angeles, did cause to be sent and transmitted by the Western Union Telegraph Company the following telegram:

“CALEXICO CAL 405 P M MCH 24-16
MISSES GRACE CLAIRE AND FAE
CARE RAYMOND TEEL E CO OR GEN DELY
BISBEE AZ
WIRED TICKETS GENERAL DELIVERY
COME IMMEDIATELY VIRGINIA HOTEL CA-
LEXICO ANSWER.

MRS. W. FABIAN.”

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Warren Fabian, on or about the 16th day of March, 1916, did induce, persuade and entice one Alma Person to go from the City of Los Angeles, State of California, to the town of Calexico, State of California.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Warren Fabian, on or about the 16th day of March, 1916, did induce, persuade and entice one Anna Gregory to go from the City of Los Angeles, State of California, to the town of Calexico, State of California.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Warren Fabian, on or about the 25th day of March, 1916, did induce, persuade and entice one Vivian de la Mar to go from the City of Los Angeles, State of California, to the town of Calexico, in the State of California.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Warren Fabian on or about the 23rd day of March, 1916, in the City of Los Angeles, did give to one Lela Caville the sum of \$10.00 for the transportation of the said Lela Caville from the City of Los Angeles, State of California, to the town of Calexico, State of California.

The Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Warren Fabian, on or about the 25th day of March, 1916, in the City of Los Angeles, did give to one Vivian de la Mar the sum of \$10.00 for the transportation of the said Vivian de la Mar from the City of Los Angeles, State of California, to the town of Calexico, State of California.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of the aforesaid unlawful conspiracy, combination, confederation and agreement, and to effect and accomplish the objects and purposes thereof, the said Lawrence Chartram, on or about the 1st day of March, 1916, in the City of Los Angeles, did solicit one Daisy North to go from the City of Los Angeles, State of California, to the town of Calexico, in the State of California.

Contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the said United States.

ALBERT SCHOONOVER

United States Attorney.

ROBERT O'CONNOR

Assistant United States Attorney.

[Endorsed]: No. 1176 Crim. United States District Court, Southern District of California. The United States of America vs. Warren Fabian, Lawrence J. Chartran, Dan Malone & F. B. Beyer. Indictment for violation of section 37, Federal Penal Code. Conspiracy to violate the Mann White Slave Act. A true bill. Gail B. Johnson, foreman. Presented and filed in open court, this 20th day of December, A. D. 1916. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

WARREN FABIAN, LAWRENCE J. CHARTRAN,
DAN MALONE and G. B. Beyer,

Defendants.

Demurrer to Indictment.

Come now the defendants and demur to the indictment herein upon the following grounds:

I.

That said indictment does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America.

II.

That said indictment does not substantially conform to or comply with the requirements of Section 950 of the Penal Code of the State of California, the state in which this Court is holden.

III.

That said indictment does not substantially conform to or comply with the requirements of Section 951 of the said last mentioned code.

IV.

That said indictment does not substantially conform to or comply with the requirements of Section 952 of the said last mentioned code.

V.

That said indictment is not direct or certain, as respects the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

That said indictment is not direct or certain sufficiently to inform the defendants of the particular circumstances of the offense with which they are attempted to be charged.

That said uncertainty consists in the following matters:

That it is not alleged in the said indictment, that the defendants conspired to transport or cause to be transported, or to aid or assist in obtaining transportation for, or in transporting, in foreign commerce, from the City of Los Angeles, State of California, or elsewhere, to the town of Mexicali, in the Republic of Mexico, or elsewhere, certain women or girls, for the purpose of debauchery within the purview of the statute mentioned in said indictment.

It is nowhere alleged in said indictment that the women or girls mentioned in said indictment were transported for, or for the purposes of, prostitution, debauchery, or other immoral purpose of the same kind, or that the said girls, as a matter of fact, did commit any such acts or things.

It is not alleged in said indictment that the defendants conspired to transport or cause to be transported, or to aid or assist in obtaining transportation for, or in transporting, in foreign commerce, any women or girls, for any sexually immoral purpose, or that any

acts specified in said indictment were by defendants intended to result in the commission of said immoral acts in the statute named, prohibited, or set forth.

It is not alleged in said indictment that any of the immoral acts attempted to be set forth as purposes for which the said women or girls were transported or caused to be transported were by defendants intended to conduce or lead to sexual immorality, prostitution, debauchery, or other immoral acts of the same kind, or that said acts were calculated by defendants to lead or cause said women or girls to commit said immoral acts of said kind.

There is no allegation in said indictment of the commission of any sexually immoral acts on the part of any women or girls transported or caused to be transported by defendants.

VI.

Said indictment further is uncertain and insufficient in this, that the specific acts set forth in said indictment, as respects each defendant, or the overt acts alleged as respects each defendant, are not alleged to have been intended by the defendants to, or calculated to, conduce to or cause any of the immoral acts prohibited by the statute mentioned, or referred to in the statute mentioned, as the purpose for which said women or girls were transported, or caused to be transported.

VII.

Said indictment further is uncertain and insufficient in that it is nowhere alleged in said indictment that defendants, or any of them, conspired to transport or cause to be transported, or to aid or assist in obtaining

transportation in foreign commerce of any women or girls who did commit, or were by defendants intended to commit, or to attempt or by defendants caused, enticed, or induced to commit or to attempt to commit, or by any person caused, enticed or induced to commit, or to attempt to commit, any acts of sexual immorality whatever, or any acts of prostitution, debauchery or other immoral acts of the same kind.

VIII.

The defendant, Beyer, particularly demurs to said indictment upon the ground that it is not alleged in said indictment that any overt act, in pursuance of any conspiracy, combination, confederacy, or agreement was by him done at any time.

IX.

That the grand jury by which the indictment was found had no legal authority to inquire into the offense charged.

X.

That the indictment shows upon its face that all overt acts alleged to have been committed in pursuance of the alleged conspiracy are alleged to have been committed after the return of said indictment.

XI.

That the said indictment was filed on the 20th day of December, 1916, and is alleged to have been found and returned on the second day of January, 1916, and the conspiracy is alleged to have been found on the first day of January, 1916, namely, one day before the finding of the indictment, and the overt acts committed in pursuance thereof are alleged to have been performed

at various dates later than the finding and return of said indictment, to-wit, in January, 1916.

EARL ROGERS and
MILTON M. COHEN,
Attorneys for Defendants.

I hereby certify that the foregoing demurrer is by me believed to be well founded in law, and properly interposed as a matter of law, and that it is not made for the purpose of delay, or for any other purpose than to present to the Court a legitimate point of law, which I believe to be well taken.

EARL ROGERS.

[Endorsed]: No. 1176 Crim. In the United States District Court in and for the Southern District of California, Southern Division. The United States of America, plaintiff, vs. Warren Fabian *et al.*, defendant. Demurrer to indictment. Filed Jan. 11, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy. Earl Rogers and M. M. Cohen, 403 California Building. Phones (Broadway 2626. F 2172. Los Angeles, Cal. Attorneys for Defendants.

At a stated Term, to wit the January Term, A. D. 1917 of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the Eleventh day of January, in the year of our Lord One Thousand Nine Hundred and Seventeen:

Present:

The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, LAWRENCE J. CHARTRAN,
DAN MALONE, and F. B. BEYER.

Defendants.

No. 1176 Crim. S. D.

This cause coming on at this time for the arraignments of defendants and for the entry of their pleas; Robert O'Connor, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on bail, with their counsel Earl Rogers, Esq.; and defendants having been called and severally arraigned, having stated that their true names are, respectively, Warren Fabian, Lawrence J. Chartran, Dan Malone and F. B. Beyer, and having waived the reading of the indictment; and a demurrer to the indictment and a motion to quash said indictment having been presented on behalf of defendant; and said motion to quash the indictment and said demurrer to said indictment having been argued, in support thereof, by Earl Rogers, Esq., of counsel for defendants; it is now by the Court ordered that defendants' said motion to quash the indictment be, and the same hereby is denied, and that defendants' demurrer to the indictment be, and the same hereby is overruled, to which ruling of the Court, on motion of defendants and by direction of the Court, exceptions are hereby noted herein on behalf of each of the defendants; and defendants being thereupon required to plead to the indictment, and having severally pleaded not guilty as charged therein, which pleas are now by order of the Court entered

herein; it is, on motion of Robert O'Connor, Esq., Assistant U. S. Attorney, of counsel for the United States, ordered that this cause be, and the same hereby is set down on Tuesday, the 1st day of May, 1917, at 10 o'clock A. M., for trial of defendants before the Court and a jury to be impanelled.

At a stated Term, to wit: the January Term, A. D. 1917, of the District Court of the United States of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the First day of May, in the year of our Lord One Thousand Nine Hundred and Seventeen.

Present:

The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, et al.,

Defendants.

No. 1176 Crim. S. D.

This cause coming on this day for the trial of all the defendants before the court and a jury to be impanelled; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; Defendants Warren Fabian, Lawrence J. Chartran and F. B. Beyer, being present on bail, with their counsel, Earl Rogers, Esq., and M. M. Cohen, Esq., Defendant Dan Malone being absent at this time; W. C. Wren being present as shorthand reporter of the testimony and proceedings, and acting as such; and the court having ordered that the trial proceed and that a jury be impanelled herein;

and the following twelve (12) petit jurors having been duly drawn, called and sworn on voir dire, to wit: John A. Farnsworth, Henry Y. Stanley, Charles O. Alkire, Frederick F. Parrish, L. N. Stott, Thomas E. Newlin, Frank N. Rust, B. E. Williams, Charles J. Nimmer, Frank C. Winter, George Carson Jr., and Samuel Sheppard; and attention having been called to the fact that one of the defendants, to wit: defendant Dan Malone, is not present in court; and the court having admonished the jurors not to permit other persons to talk to them about this case or anything connected with it, and not themselves to speak to other persons or to each other about this case or anything connected with it during a recess which the court is about to take, and court thereupon at the hour of 10:20 o'clock, A. M., having taken a recess pending efforts to secure the attendance of defendant Dan Malone; and now at the hour of 10:27 o'clock, A. M., court having reconvened; and counsel and shorthand reporter being present as before; and all of the defendants now being present in court, on bail; and the twelve jurors sworn on voir dire being present in the jury box; now, pursuant to the stipulations of counsel for the Government and counsel for defendants, in open court, it is ordered that all proceedings herein this day prior to the presence in court of defendant Dan Malone shall be deemed to have been entirely regular and not subject to exception; and the examination of the jurors having been commenced, and during said examination on motion of Earl Rogers, Esq., of counsel for defendants, on behalf of defendants, and by direction of the court, the exceptions having been noted

herein to the method of exercising challenges of jurors herein; now, on motion of Earl Rogers, Esq., of counsel for defendants, it is ordered that Charles Scholz be, and he hereby is associated with Earl Rogers, Esq., and M. M. Cohen, Esq., as counsel for defendants; and said twelve jurors in the box having been examined by the court and by counsel for the Government and by counsel for defendants; and L. N. Scott having been challenged for cause by the Government which challenge is not resisted, and the juror excused; and Frank N. Rust having been challenged for cause by defendants, which challenge is not resisted and the juror excused; and the remaining ten jurors having been passed for cause; and Charles J. Nimmer having been challenged peremptorily by the Government and excused; and Thomas E. Newlin having been challenged peremptorily by defendants and excused; and Henry Y. Stanley having been challenged peremptorily by defendants and excused; and George Carson Jr., having been challenged peremptorily by the Government and excused; and Samuel Sheppard and B. E. Williams having been challenged peremptorily by defendants and excused; and the remaining four jurors, to wit: Jurors John A. Farnsworth, and Charles O. Alkire, Frederick F. Parrish and Frank C. Winter having been accepted by counsel for the Government and by counsel for defendants and duly sworn as jurors to try this cause; and the court having admonished the jurors sworn to try this cause that, during this trial, they are not to permit other persons to speak to them, nor themselves speak to other persons about this case, or anything connected with this case,

and that, until said case is finally given them for consideration under the instructions of the court, they are not to speak to each other about this case, or anything therewith connected; and the court thereupon, at the hour of 11:30 o'clock, A. M., having taken a recess for eleven minutes; and now, at the hour of 11:41 o'clock, A. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jurors are present, and said jurors being present in court; and, in place of the eight jurors excused, the following petit jurors having been drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendants and passed for cause, to wit: Howard S. Dudley, I. B. Newton, Alonzo H. Potter, Fred C. Adams, A. A. Allen, Lynn C. Standford, Harry H. Baskerville, and Perry Whiting; and Perry Whiting having been challenged peremptorily by the Government and excused; and I. B. Newton having been challenged peremptorily by defendants and excused; and Harry H. Baskerville having been challenged peremptorily by defendants and excused; and jurors Howard S. Dudley, Alonzo H. Potter, Fred C. Adams, A. A. Allen and Lynn C. Standford having been accepted by counsel for the Government and by counsel for defendants and duly sworn as jurors to try this cause; and the court having admonished the jurors that, during this trial, they are not to permit other persons to speak to them, nor themselves speak to other persons about this case, or anything connected with it, and that, until said case is given them for considera-

tion under the instructions of the court they are not to speak to each other about this case, or anything therewith connected; and court thereupon at the hour of 12:16 o'clock P. M., having taken a recess until the hour of 2 o'clock, P. M., of this day, until which time the jurors sworn to try this case and the remaining petit jurors whose names have not been drawn are excused;

And now, at the hour of 2 o'clock, P. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; counsel for the respective parties having stipulated that the jurors sworn to try this case are present, and said jurors being present in court; and in the place of jurors Whiting, Newton and Baskerville, who were excused, the following petit jurors, to wit: Eugene Bassett, Charles E. Love and Gervaise Purcell, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendants and passed for cause; and Eugene Bassett having been challenged peremptorily by defendants and excused; and Charles E. Love and Gervaise Purcell having been accepted by counsel for the Government and by counsel for defendants and duly sworn as jurors to try this cause; and, in place of the juror Bassett, Robert C. Conant, a petit juror, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendants and passed for cause, and said juror Conant, having thereupon been challenged peremptorily by defendants and excused; and William W. Widney, a petit juror, having been

duly drawn, called, sworn on voir dire, and examined by the court and by counsel for the Government and by counsel for defendants, and said juror, Widney, having been challenged for cause by defendants, which challenge is resisted by the Government and sustained by the court, and the juror excused; and John J. Byrne, a petit juror, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendants and passed for cause; and said juror John J. Byrne having been peremptorily challenged by the Government and excused; and the panel of petit jurors having been exhausted, and there being only eleven (11) jurors in the box; it is by the court ordered that a special venire issue from the Clerk's office herein for five jurors to be summoned from the bystanders, said venire to be returnable at the hour of 3:30 o'clock, P. M., of this day; and the court having admonished the jurors sworn to try this cause that, during this trial, they are not to permit other persons to speak to them, nor themselves speak to other persons, about this case, or anything connected with it, and that, until this case is given them for consideration, under the instructions of the court, they are not to speak to each other about this case, or anything connected therewith; and court thereupon, at the hour of 2:50 o'clock, P. M., having taken a recess until the hour of 3:30 o'clock P. M., of this day, until which time the jurors are excused; and now, at the hour of 3:30 o'clock P. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and the eleven jurors now sworn to try this case being present

in court; and the United States Marshal having made return of the Special Venire issued herein this day, as follows, to wit: "In obedience to the within venire I have summoned the following: E. Sidney Phelps, R. N. Morphis, T. Ludlow, C. W. Green, W. H. Collins.—C. T. Walton United States Marshal by D. S. Bassett Deputy U. S. Marshal This 1st day of May 1917."; and the roll of said special veniremen having been called, and all being present and their names having been put in the box; and C. W. Green, a special venireman, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government, and by counsel for defendants, and challenged for cause by defendants, which challenge is sustained by the court and the special venireman excused; and R. N. Morphis, a special venireman, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendants and passed for a cause, and having thereupon been challenged peremptorily by the Government and excused; and W. H. Collins, a special venireman, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for the defendants and passed for cause, and having thereupon been challenged for cause by defendants and excused; and T. Ludlow, a special venireman, having been duly drawn, called, on voir, dire, examined by the court and by counsel for the Government and by counsel for defendants and passed for cause, and having thereupon been challenged peremptorily by defendants and excused; and E. Sidney Phelps, a special venireman,

having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendant and passed for cause and accepted by the counsel for the Government and by counsel for defendants and duly sworn as a juror to try this cause; and the impanelment of the jury being completed, and jury as so impanelled and sworn consisted of the following jurors, to wit:

Jury:

- | | |
|--------------------------|------------------------|
| 1. John A. Farnsworth, | 5. Howard S. Dudley, |
| 2. A. A. Allen, | 6. Fred C. Adams, |
| 3. Charles O. Alkire, | 7. Charles E. Love. |
| 4. Frederick F. Parrish, | 8. E. Sidney Phelps, |
| 9. Alonzo H. Potter, | 11. Lynn C. Standford, |
| 10. Frank C. Winter, | 12. Gervaise Purcell; |

It is ordered that the four special venireman present this day pursuant to summons and excused be paid their lawful fees for attendance by the U. S. Marshal for this District; and the indictment having been read to the jury, and the pleas of not guilty of all of the defendants having been announced to the jury by the Clerk; and the court having admonished the jurors that, during this trial, they are not to permit other persons to speak to them nor themselves speak to other persons, about this case, or anything connected with this case, and that, until this case is given them for consideration, under the instructions of the court, they are not to speak to each other about this case, or anything therewith connected; it is, at the hour of 4:50 o'clock, P. M., ordered that this cause be, and the same hereby is continued for further trial until Wednesday,

the second day of May, 1917, at 10 o'clock, A. M., until which time the jurors are excused.

At a stated term, to wit: the January Term, A. D., 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, on Wednesday, the Second day of May in the year of our Lord One Thousand Nine Hundred and Seventeen;

Present:

The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, et al.,

Defendants.

No. 1176 Crim. S. D.

This cause coming on this day for the further trial of all the defendants before the court and a jury heretofore duly impanelled herein; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., Assistant United States Attorneys, appearing as counsel for the United States; each and all of the defendants being present on bail, with their counsel, Earl Rogers, Esq., M. M. Cohen, Esq., and Charles Scholz, Esq.; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; W. C. Wren being present as shorthand reporter of the testimony and proceedings, and acting as such and Earl Rogers, Esq., of counsel for defendants, having

moved that this cause be dismissed, and having objected to the introduction of testimony under the indictment herein; and said motion and objection having been argued, in support thereof, by Earl Rogers, Esq., of counsel for defendants, and in opposition thereto by Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States; and the minutes of this court for July 24th, 1916, relating to the impanelment of the U. S. Grand Jury for the July Term, 1916, of this court, and the minutes of this court for December 20th, 1916, relating to the presentation of the indictment and order for filing same, etc., in this cause, having been offered and admitted in evidence on behalf of the Government; it is now by the court ordered that defendants' motion to dismiss this cause be, and the same hereby is denied, and it is further ordered that defendants' objection to the introduction of testimony under the indictment herein be, and the same hereby is overruled; to which rulings, on motion of counsel for defendants, and by direction of court, and exception is hereby noted and Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States, having moved to amend the indictment in this cause by striking out the word "January" in the first paragraph of said indictment, and inserting in lieu thereof the word "July," it is by the court ordered that said motion to amend the indictment herein be, and the same hereby is denied; and Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States, having made a statement to the jury of what the Government expects to prove; and Earl Rogers, Esq., of counsel for defendants, having made a state-

ment to the jury of what defendants expect to prove in their defense; and Sally Margaret Claxton having been called and sworn as a witness on behalf of the United States and having given her testimony; and the court having given the jury the usual admonition; and court thereupon, at the hour of 11:15 o'clock, A. M., having taken a recess for twelve minutes; and now, at the hour of 11:27 o'clock, A. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury is present, and all the said jurors being present in court; and Sally Margaret Claxton, a witness on behalf of the United States, having again taken the stand for further examination, and having given her testimony; and the court having given the jury the usual admonition; the court thereupon, at the hour of 12:01 o'clock, P. M., having taken a recess until the hour of 2 o'clock, P. M., of this day;

And now, at the hour of 2 o'clock, P. M., court having reconvened; and defendants and counsel being present as before; A. S. Custer and W. C. Wren being present as shorthand reporters of the testimony and the proceedings, and acting as such; and counsel for the respective parties having stipulated that the jury is present, and all the jurors being present in the court; and the question as to the admissibility of certain testimony having been argued, on behalf of defendants, by Earl Rogers, Esq., of counsel for defendants; and Sally Margaret Claxton, a witness on behalf of the United States having again taken the stand for further examination, and having given her testimony; and, in

connection with the testimony of said witness, defendant having offered an exhibit for identification, which is for identification marked with certain exhibit designations, to wit: Deft. Ex. A, Blank theatrical contract of Owl Cafe; and, also in connection with the testimony of said witness, the Government having offered for identification an exhibit, which is for identification marked with certain exhibit designations, to wit: Govt. Ex. 1, Blank theatrical contract of Owl Cafe, with certain writing on the back of same; and thereafter Deft. Ex. A having been admitted in evidence on behalf of defendant, and Govt. Ex. 1 having been admitted in evidence on behalf of the Government; and the court having given the jury the usual admonition; and court thereupon, at the hour of 3:30 o'clock, P. M., having taken a recess for seven minutes; and now, at the hour of 3:37 o'clock, P. M., court having reconvened; and defendants, counsel and shorthand reporters being present as before; and counsel for the respective parties having stipulated that the jury is present, and all of said jurors being present in court; and Sally Margaret Claxton, a witness on behalf of the United States, having again taken the stand for further examination, and having given her testimony; and C. F. Willard having been called and sworn as a witness on behalf of the United States, and having testified, and having been withdrawn temporarily; and Mrs. Warren Fabian having been called as a witness on behalf of the United States, and Earl Rogers, Esq., of counsel for defendants, having objected to the swearing of Mrs. Warren Fabian as a witness herein on behalf of the United States, which objection is sustain by the Court and said

witness Mrs. Warren Fabian withdrawn without having been sworn or given testimony herein; and Alma Person having been called and sworn as a witness on behalf of the United States, and having given her testimony; now, pursuant to stipulation of counsel for the respective parties, in open Court, it is ordered that all rulings herein adverse to defendants shall be deemed to have been accepted to; and the Court having given the jury the usual admonition; thereupon, at the hour of 4:52 o'clock P. M., it is ordered that this cause be, and the same hereby is continued for further trial until Thursday, the 3rd day of May, 1917, at 10 o'clock, A. M., until which time the jurors are excused.

At a stated term, to wit: the January Term, A. D., 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the Third day of May, in the year of our Lord One Thousand Nine Hundred and Seventeen;

Present:

The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, et al.,

Defendants.

No. 1176 Crim. S. D.

This cause coming on this day for the further trial of all the defendants before the court and a jury to

be impanelled; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants Warren Fabian, Lawrence J. Chartran and F. B. Beyer being present on bail, with their counsel, Earl Rogers, Esq., M. M. Cohen, Esq., and Charles Scholtz, Esq.; and defendant Dan Malone being absent at this time; W. C. Wren and A. S. Custer being present as shorthand reporters of the testimony and proceedings, and acting as such; now, on account of the absence of defendant Malone, this cause is not called for said further trial, but passed for the same until the hour of 10:40 o'clock, A. M., of this day; and it is ordered that Dr. E. H. Garrett, in company with defendants' counsel, visit said defendant Dan Malone, with a view of ascertaining his physical condition; and it is further ordered, on motion of Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States, that an *attachemtn* issue forthwith to Mrs. Grace Covert, a defaulting witness on behalf of the United States; and court, at the hour of 10:10 o'clock, A. M., having taken a recess for 37 minutes; and now, at the hour of 10:47 o'clock, A. M., court having reconvened; and counsel and shorthand reporters being present as before; and all of the defendants except defendant Dan Malone being present on bail; and counsel for the respective parties having stipulated that the jury is present, and all the said jurors being present in court; and M. M. Cohen, Esq., of counsel for defendants, having made a statement to the court as to the physical condition of defendant Dan Malone; it is by the court ordered that this cause be not called at this

time for the further trial of defendants, but continued until the hour of 1 o'clock, P. M., of this day, to be at that time called for said trial; and court thereupon, at the hour of 10:50 o'clock, A. M., having taken a recess until the hour of 1 o'clock, P. M., of this day; and now, at the hour of 1 o'clock, P. M., court having reconvened; and counsel and shorthand reporters being present as before; and each and all of the defendants being now present in court; and counsel for the respective parties having stipulated that the jury is present, and all of said jurors being present in court; and the court having ordered that the trial proceed; and Alma Person, a witness on behalf of the United States, having again taken the stand for further examination, and having given her testimony; and Mrs. Grace Covert, a witness on behalf of the United States, having been called and sworn and having given her testimony; and, in connection with the testimony of said witness, the Government having offered, for identification, a telegram, signed Mrs. W. Fabian, which is for identification marked Pl. Ex. 2.; and, also in connection with the testimony of said witness, the Government having offered an exhibit, which is admitted in evidence in its behalf, to wit: Pl. Ex. 3, Theatrical contract of Grace Claire; and, also in connection with the testimony of said witness, defendants having offered an exhibit, which is admitted in evidence in their behalf, to wit: Deft. Ex. B, Envelope and letter to Mrs. Grace Fabian, and there having also been offered and admitted, Govt. Ex. C., Telegram, "Claire and Fae" to Mrs. Fabian, and the court having given the jury the usual admonition; this cause there-

upon, at the hour of 2:10 o'clock, P. M., is passed temporarily for further trial.

* * * * *

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

WARREN FABIAN, et al.,

Defendants,

No. 1176 Crim. S. D.

This cause having been again called at this time for the further trial of all the defendants before the Court and a jury heretofore duly impanelled herein; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; each and all of the defendants being present on bail, with their counsel, Earl Rogers, Esq., M. M. Cohen, Esq., and Charles Scholtz, Esq.; W. C. Wren and A. S. Custer being present as shorthand reporters of the testimony and proceedings, and acting as such; and counsel for the respective parties having stipulated that the jury is present, and all of the jurors being present in Court; and Mrs. Grace Covert, a witness on behalf of the United States, having again taken the stand for further examination, and having given her testimony; it is, on motion of Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States, ordered that the attachment heretofore on this day issued for Mrs. Grace Covert, a U. S. witness, but not served, be, and said attachment hereby is quashed; and Anna Gregory having been called and sworn as a witness on behalf of the United States; and Earl Rogers, Esq., of counsel for defendants, having ob-

jected to said witness Anna Gregory testifying in this cause, it is by the court ordered that said objection be, and the same hereby is sustained, and said witness Anna Gregory is thereupon excused without having testified herein; and Barney Morris having been called and sworn as a witness on behalf of the United States, and thereupon an order having been made and entered in another cause, to wit: No. 1130 Crim. S. D. The United States of America, plaintiffs, vs. Warren Fabian, et al., defendants, which said order is elsewhere in the minutes of this day entered, dismissing said cause as to defendant Barney Morris, and said witness Barney Morris having thereupon given his testimony herein; and, in connection with the testimony of said witness, the Government having offered a theatrical contract, with signature "F. B. Beyer" thereon, for identification, which is for identification marked Pl. Ex. 4, and said exhibit having thereafter been admitted in evidence on behalf of the United States; and Daisey Smith, Dick Parks and Henry W. Delo having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and C. F. Willard a witness on behalf of the United States, having been recalled for further
his

examination, and having given ~~their~~ testimony; and the court having given the jury the usual admonition; and the court thereupon, at the hour of 3:30 o'clock, P. M., having taken a recess for ten minutes; and now, at the hour of 3:40 o'clock, P. M., court having reconvened; and defendants, counsel and shorthand reporters being present as before; and counsel for the

respective parties having stipulated that the jury is present, and all of said jurors being present in court; and Dave Gershon having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the return of the U. S. Marshal on each of two (2) subpoenas issued and filed herein having been offered and admitted in evidence on behalf of the United States; and the Government having rested; and the court having given the jury the usual admonition; and the jury having been excused until Friday, the 4th day of May, 1917, at 10 o'clock, A. M., now, at the hour of 3:52 o'clock, P. M., it is ordered that this cause be, and the same hereby is continued for further trial until Friday, the 4th day of May 1917, at 9:30 o'clock, A. M.

At at stated term, to wit: the January Term, A. D., 1917 of the District Court of the United States of America, in and for the Southern Division of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, on Friday, the Fourth day of May, in the year of our Lord One Thousand Nine Hundred and Seventeen;

Present:

The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, et al.,

Defendants,

No. 1176 Crim. S. D.

This cause coming on this day for the further trial

of all the defendants before the court and a jury heretofore duly impanelled herein; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; each and all of the defendants being present in court, with their counsel, Earl Rogers, Esq., M. M. Cohen, and Charles Scholz, Esq., W. C. Wren and A. S. Custer being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; now, on motion of M. M. Cohen, Esq., of counsel for defendants, it is ordered that the deposition of Francisco Borques on behalf of *and* said defendants be opened and published by the Clerk; and said deposition having accordingly been opened and published by the Clerk; and the deposition of said Francisco Borques on behalf of defendants having been read to the jury by M. M. Cohen, Esq., of counsel for defendants; and, in connection with said deposition, defendants having offered a Pamphlet printed in the Spanish language, which is admitted in evidence in their behalf as Deft. Ex. D.; and counsel for the respective parties having, in open court, entered into a stipulation as to certain phases of the laws of the Republic of Mexico; and the court having given the jury the usual admonition; and the court thereupon, at the hour of 10:55 o'clock, A. M., having taken a recess for nine minutes; and now, at the hour of 11:04 o'clock, A. M., court having reconvened; and defendants, counsel and shorthand reporters being present as before; and counsel for the respective parties having stipulated that the jury is present, and all of the jurors being present in court;

and defendants having rested; and the testimony being closed; and this cause having been argued to the jury, on behalf of the Government, by Gordon Lawson, Esq., Assistant U. S. Attorney, of counsel for the United States, and on behalf of defendants by M. M. Cohen, Esq., of counsel for defendants; and the Court having given the jury the usual admonition; and Court thereupon, at the hour of 11:53 o'clock, A. M., having taken a recess until the hour of 2 o'clock, P. M., of this day, until which time the jurors are excused;

And now, at the hour of 2 o'clock, P. M., court having reconvened; and defendants, counsel and shorthand reporters being present as before; and counsel for the respective parties having stipulated that the jury is present, and all of the jurors being present in court and this cause having been further argued to the jury, on behalf of defendants, by Earl Rogers, Esq., of counsel for defendants; and the court having given the jury the usual admonition; and court thereupon, at the hour of 3:05 o'clock, P. M., having taken a recess for 11 minutes; and now, at the hour of 3:14 o'clock, P. M., court having reconvened; and defendants, counsel and shorthand reporters being present as before; and counsel for the respective parties having stipulated that the jury is present, and all of the jurors being present in court; and this cause having been further argued to the jury, on behalf of the Government in reply, by Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States; and the court having given the jury the usual admonition; thereupon, at the hour of 4:05 o'clock, P. M., it is ordered that this cause be, and the same hereby is con-

tinued for the further trial of all the defendants until Saturday, the 5th day of May, 1917, at 10 o'clock, A. M., until which time the jurors are excused.

At a stated term, to wit: the January Term, A. D., 1917 of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, on Saturday, the Fifth day of May, in the year of our Lord One Thousand Nine Hundred and Seventeen;

Present:

The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, et al.,

Defendants.

No. 1176 Crim. S. D.

This cause coming on this day for the further trial of all the defendants before the court and a jury heretofore duly impanelled herein; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; each and all of the defendants being present on bail, with their counsel, M. M. Cohen, Esq., A. S. Custer being present as shorthand reporter of the proceedings, and acting as such; and the roll of the jury having been called, and all being present; and the court having read to the jury its written instructions; now, on motion of defendants, by their said counsel, it is ordered that exceptions be, and they hereby are noted herein on

behalf of said defendants to each and every of the instructions offered by the Government, and also to the comments by the court on the evidence in this cause in the course of its instructions to the jury, and also to the refusal of the court to give such of the instructions requested by the defendants as the court did refuse to give; and J. W. Bell, a Deputy U. S. Marshal, having been duly sworn to take charge of the jury; the jury at the hour of 10:25 o'clock, A. M., retire in charge of

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THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, et al.,

Defendants,

No. 1176 Crim. S. D.

The jury, at the hour of 11:53 o'clock, A. M., having come into court; Gordon Lawson, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; each and all of the defendants being present on bail, with their counsel, M. M. Cohen, Esq.; A. S. Custer being present as shorthand reporter of the proceedings, and acting as such; and counsel for the respective parties having stipulated that the jury is present, and all of the jurors being present in court; and the jurors having been asked if they have agreed upon a verdict, and having, through their foreman, stated that they have so agreed, and having been required to present their verdict; and their verdict having been read by the Clerk; now, by direction of the court,

said verdict is filed and recorded by the Clerk, said verdict as so recorded being as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

The United States of America, Plaintiffs, vs. Warren Fabian, Lawrence J. Chartran, Dan Malone and F. B. Beyer, Defendants. No. 1176 Crim. We, the Jury in the above entitled cause, find the defendant, Warren Fabian guilty as charged in the Indictment, and the Defendant, Lawrence J. Chartran not Guilty as charged in the Indictment and the Defendant, Dan Malone guilty as charged in the Indictment, and the Defendant F. B. Beyer, Guilty as charged in the Indictment. Los Angeles, California, May 5th, 1917.

Lynn C. Standford, FOREMAN.

And said verdict as so recorded having been read to the jurors, and the jurors having said that it is their verdict; it is ordered that said jurors be, and they hereby are excused until Thursday, the 10th day of May, 1917, at 10 o'clock, A. M.; and it is further ordered, that defendant Lawrence J. Chartran be, and he hereby is discharged; and it is further ordered that for the sentence of defendants Fabian, Malone and Beyer, this cause be, and the same hereby is continued until Monday, the 28th day of May, 1917, at 2 o'clock, P. M., said defendants last named in the meantime to remain at large under the bail bonds given by them in cause No. 1130 Criminal S. D., The United States of America plaintiffs, versus Warren Fabian, et al., Defendants.

*In the District Court of the United States in and for
the Southern District of California Southern Di-
vision.*

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WARREN FABIAN, LAWRENCE J. CHARTRAN,
DAN MALONE and F. B. BEYER.

Defendants,

No. 1176 Crim.

Verdict.

We, the Jury in the above-entitled cause, find the Defendant, Warren Fabian—— Guilty as charged in the Indictment, and the Defendant, Lawrence J. Chartran Not Guilty as charged in the Indictment, and the Defendant, Dan Malone——Guilty as charged in the Indictment, and the Defendant F. B. Beyer—— Guilty as charged in the Indictment.

Los Angeles, California, May 5th, 1917.

Lynn C. Standford,

FOREMAN.

[Endorsed]: No. 1176 Crim. U. S. District Court, Southern District of California, Southern Division, United States of America vs. Warren Fabian, et al. Verdict. Filed May 5, 1917 Wm. M. Van Dyke, Clerk By Geo. W. Fenimore Deputy Clerk.

At a stated Term, to wit: the January Term, A. D., 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles on Tues-

day, the Nineteenth day of June, in the year of our Lord One Thousand Nine Hundred and Seventeen;

Present:

The Honorable Oscar A. Trippet, District Judge.
THE UNITED STATES OF AMERICA,
Plaintiffs,

vs

WARREN FABIAN, et al.,

Defendants.

No. 1176 Crim. S. D.

This cause coming on this day to be heard on the motion of defendants Warren Fabian, Dan Malone and F. B. Beyer for a new trial; Wm. F. Palmer, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants Fabian, Malone and Beyer being present on bail, with their counsel, Earl Rogers, Esq., M. M. Cohen, Esq., and Charles Scholz, Esq.; W. C. Wren being present as shorthand reporter of the proceedings and acting as such; and said motion for a new trial having been argued, in support thereof, by Earl Rogers, Esq., of counsel for defense, and in opposition thereto by Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States, and in support thereof in reply by Earl Rogers, Esq., of counsel for defendants; and court, at the hour of 11:25 o'clock, A. M., having taken a recess for 12 minutes; and now, at the hour of 11:37 o'clock, A. M., court having reconvened; and defendants, counsel and shorthand reporters being present as before; and this cause having been submitted to the court for its consideration and decision on said motion for a new trial;

and the court having announced its conclusions thereon, it is accordingly ordered that the motion of defendants Fabian, Malone and Beyer for a new trial be, and the same hereby is denied, to which ruling of the court, on motion of counsel for defendants and by direction of the court, exceptions are hereby noted herein on behalf of defendants Fabian, Malone and Beyer; and a motion of said defendants Fabian, Malone and Beyer in arrest of judgment having been filed herein in open court, it is by the court ordered that said motion in arrest of judgment be, and the same hereby is denied, to which ruling of the court, on motion of counsel for defendants and by direction of the court, exceptions are hereby noted herein on behalf of said defendants Fabian, Malone and Beyer; and this cause having thereupon come on for the sentence of defendants Warren Fabian, Dan Malone and F. B. Beyer; and statements in litigation of sentence having been made by Earl Rogers, Esq., of counsel for said defendants; and statements concerning sentence having been made by Wm. F. Palmer, Esq., Assistant U. S. Attorney, of counsel for the United States; and court, at the hour of 12:02 o'clock, P. M., having taken a recess until the hour of 2 o'clock, P. M., of this day;

And now, at the hour of 2 o'clock, P. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and further statements in litigation of sentence having been made by Earl Rogers, Esq., of counsel for defendants; and court, at the hour of 2:18 o'clock, P. M., having taken a recess for 11 minutes; and now, at the hour of 2:29 o'clock, P. M., court having reconvened; and

defendants, counsel and shorthand reporter being present as before; the court therefor pronounces sentence upon said defendants Fabian, Malone and Beyer for the offense of which they stand convicted, namely conspiracy to violate the Mann White Slave Act, in violation of Section 37 of the United States Criminal Code, as follows, to wit: The Judgment of the Court is, that each one of said defendants Warren Fabian, Dan Malone and F. B. Beyer pay a fine of one thousand (1000) dollars, and that each of said three defendants stand committed to the County Jail of Los Angeles County, California, until his fine is paid; and defendant Beyer having announced his intention to sue out a writ of error herein, it is ordered that the amount of the bond of said defendant F. B. Beyer on writ of error be, and the same hereby is fixed at \$2000.00, and it is further ordered, on motion of said defendant, that defendant F. B. Beyer be, and he hereby is granted twenty (20) days within which to prepare, serve and file bill of exceptions herein; and said defendant F. D. Beyer having presented his petition for writ of *writ of* error and assignment of errors, which are filed herein, and order allowing writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and a citation are signed in open court, and a writ of error accordingly and bond on writ of error are approved and filed in open Court.

*In the District Court of the United States for the
Southern District of California, Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

v.

F. B. BEYER,

Defendant.

No. 1176, Crim.

Bill of Exceptions of Defendant F. B. Beyer.

Be it remembered that heretofore, to-wit: on the 20th day of December, 1916, the Grand Jury of the United States, in and for the Southern District of California, Southern Division, did find and return unto the above entitled Court its indictment against the defendants, F. B. Beyer, Warren Fabian, Lawrence Chartran and Dan Malone, for violation of Section II of the Mann White Slave Traffic Act, and thereafter, on the 11th day of January, 1917, the said F. B. Beyer appeared in said Court and was duly arraigned upon the said indictment and entered his plea of "not guilty" thereto, and thereafter, upon the 11th day of January, 1917, the said F. B. Beyer filed a demurrer to said indictment, and thereafter, upon the 11th day of January, 1917, the said demurrer was duly heard by said Court, which duly and regularly made its order overruling said demurrer, to which order of the Court, then and there made, overruling the demurrer of said defendant, the said defendant took an exception, which exception was then and there duly and regularly allowed and entered by the Court; that, upon the 11th day of January, 1917, said defendant

filed in said Court his Motion to Quash said indictment, and thereafter, on the 11th day of January, 1917, said motion was duly heard by said Court, which duly and regularly made its order denying said motion, to which order of the Court, then and there made, denying the motion of said defendant, the said defendant took an exception, which exception was then and there duly and regularly allowed and entered by the Court.

That thereafter, upon the first day of May, 1917, said cause came on duly and regularly for trial, the Government being represented by Fleet W. Palmer and Gordan Lawson, Esqs., Assistant United States District Attorneys for the Southern District of California, and the defendant being represented by Earl Rogers, Charles Scholz and Milton M. Cohen, Esqs. Thereupon the jury to try the cause was duly and regularly impaneled and the following proceedings took place on and during the trial, to-wit: Opening Statement on Behalf of the Prosecution by Mr. Palmer:

MR. PALMER: May it please the court and gentlemen of the jury:

I don't know that there will be any serious conflict between the defendants and the Government as to what the facts are in this case. I apprehend that the conflict will come upon what these facts prove.

I believe that the evidence will show you that the defendants, F. B. Beyer, who was one of the owners of the Owl Cafe at Mexicali, which is just across the line in Mexico from Calexico, which is in the State of California, and L. J. Chartran, another one of the defendants, who was a bartender in this Owl Cafe in Mexicali, and Dan Malone, who was the man-

ager of the Owl Cafe, and Warren Fabian, who was the manager of the entertainment part, the manager of the chorus, and the evidence may show—

THE COURT: The manager of what?

MR. PALMER: The chorus.

THE COURT: Oh, yes.

MR. PALMER: And the evidence may show that this chorus was known by the name of Flora Dora Babies, some such name as that. This Owl Cafe was all under one roof. The front room was where the bar was located, the bar and the ice box that has to go with the bar. And also in the room where the bar was, was located gambling tables, where I presume a man might play any kind of a game. I presume the evidence will show that a man might play any kind of a game that is known to the gambling fraternity, starting perhaps with cent ante, and going all the way up to old high, or down to old high. And in that room men were there for the purpose of gambling and for the purpose of drinking at the bar.

Now at the rear of that room, of that portion, was a picket fence, a low picket fence, and back of that was a dance hall. In that dance hall there was a place for the orchestra, of course, and a floor space where dancing might be done and where the Flora Dora Babies displayed themselves upon the floor; and also along the sides were tables ranged, and those tables—there were seats, rather; when you go into the table, it was a kind of a nook, a breakfast room proposition. You go in, and there are seats for two on this side of the table, and seats for two on this side of the table, and then the back of the seat formed a

partition, and right on the other side was a seat for two more, and then a table, and then a seat, and so on, on each side of the rooms.

And then the chorus, the entertainers, came into this dance hall at certain stated periods, their time of work beginning at 7:30 in the evening and closing at 3 o'clock in the morning, the next morning. And they would come upon the floor, perhaps the evidence will show, in skin tights,—I don't know just exactly what they may mean, but that is probably what the evidence will show; and they would perform as the chorus performed, and after they had done that they would retire then to their dressing rooms, and there they would put on another kind of clothes, and the other kind of clothes that they would put on, as I am informed the evidence will show, was Buster Brown suits; and then they would come out upon the floor and dance with such men as were there in the dance hall. They would respond to requests to dance, if there were such; and, if not, they would request the dance.

I think the evidence will show that it was always leap year in that dance hall. And the evidence will show also that after they danced, or when they danced, or at any time when they danced, that they would take men and drink with them, and a part of their arrangement was that if they cared to do so, that they would be allowed 40 per cent on all drinks that were sold to them with whom they were sitting, unless it was Schlitz beer, and if they sold Schlitz beer, then their profit was to be 50 per cent on the sales. I don't know whether the evidence will show that that was

not as good beer as others or not. I don't know that the evidence will go into that.

The evidence will also show that immediately in the rear of the dance hall, and immediately by the door where these girls went, the chorus went, to change their clothing,—their dressing-room—there was another door, and that door led out into a hallway, upon each side of which were small dens, commonly called cribs, and in those cribs were prostitutes, practicing prostitution. And the evidence will show you, I believe, that those prostitutes, when the dance was going on in the dance hall, came out of those cribs upon the dance floor, and at the same time that the chorus girls were dancing with men, whatever men were there, that these prostitutes also were dancing with men, and that the solicitation was to take the men to the cribs. And that the chorus girls knew what was going on there; they knew these women were prostitutes; they knew that they were upon the dance floor with prostitutes; they knew that the men were dancing with prostitutes, and that those prostitutes were soliciting men upon the dance hall floor to go into their cribs with them. The evidence will show you that they knew all about that, and the evidence will show you that the surroundings there were of that character.

Now, the evidence will also show you that these four defendants brought women who were not prostitutes down to Calexico, and had them to live in Calexico, in a hotel. The evidence will show you that they had those girls to go across the line at night, and to take the part of the Flora Dora Babies there upon that dance hall floor. It will show you that these

defendants, in order to protect themselves, perhaps, from a prostitution under the Mann Act, made in their contracts with these girls stipulations that they should not practice prostitution; that if they were guilty of practicing prostitution, that they would be discharged, and some such things of that kind. But the evidence will show you that these men, these defendants, knew when they asked these girls to go down there the character of the place; they knew that they were taking these girls to perform in a whore house; they knew they were taking these girls down there to associate with whores; they knew, and the evidence will show, that they paid the price, they paid the fare of these girls to take them down there; that these girls were not prostitutes themselves, but they were taken there, and these defendants knew when they were taking them there that they were taking them there to associate with whores and that they were taking them there for the purpose of drinking with men whores, as well as association with women whores, and subjecting them to the things that a woman would be subjected to, to the solicitations of men who were drinking and in a place of that kind.

Now, gentlemen, we believe if the evidence shows the things that I have stated to you, that there can be no question but that these defendants have been guilty of violating the Mann Act; and if we prove the things that I have suggested to you, we shall ask at your hands a conviction of the defendants.

I thank you.

Motion, discussion, objection and exception of defendant of any evidence being submitted to jury in pro-

ceeding on the ground that face of indictment discloses the filing of same before found. (Reporter's Transcript page 3):

MR. ROGERS: If your Honor pleases, we desire at this time, before counsel offers any evidence or makes an opening statement as to the evidence which he expects to introduce, I desire to move to dismiss this case, and I object to the introduction of any evidence under the indictment—the motion being, I take it, to the same effect—upon these grounds: The indictment commences with this statement: "At a stated term of said court, towit, the District Court of the Southern District, begun and holden in the city of Los Angeles, county of Los Angeles, within and for the Southern Division," and so forth, "on the second Monday of January in the year of our Lord one thousand nine hundred and sixteen, the grand jurors of the United States of America, chosen and sworn within said division, on their oaths present."

THE COURT: And it was in the July term?

MR. ROGERS: Yes sir. Pardon me, sir. I will reach the correct statement. "Heretofore, to-wit, on or about the 1st day of January in the year of our Lord one thousand nine hundred and sixteen, in the Southern Division of California," and so forth, they did certain things.

Now, the indictment has this endorsement: "A true bill, presented and filed in open court this 20th day of December, 1916."

The indictment, therefore, appears to have been found by a jury, a grand jury, during the month of

January, 1916, and not to have been filed during the existence of that grand jury.

And, moreover, it appears that the offense is said to have been committed subsequent, according to the allegations of the indictment, subsequent to the time—prior, I should say, to the finding of the indictment. In other words, the indictment was found before the offense is said to have been committed. Now, if the grand jury was holding its sessions and finding in January of 1916 the acts alleged to have been committed, the overt acts which are set forth,—it is not necessary I specify each one of them which are said to have been committed subsequent to the empaneling of the grand jury—before the empaneling of the grand jury that found the indictment.

I presume—I don't know but what it is true that it is probably a clerical error, but nevertheless I doubt the jurisdiction of this court, or the district attorney, to amend an indictment without resubmission to a grand jury for the purpose of consideration. I have looked up the matter rather carefully, and I find that there is no provision for the amending of a document found by a grand jury. The grand jury must itself amend its own papers, and I therefore object upon the ground that the indictment shows upon its fact that it is invalid and that the overt acts were not committed within the time that the grand jury existed.

THE COURT: Let me see the indictment.

MR. PALMER: I take issue with the gentleman on the proposition that the overt acts were not committed before the indictment was returned. The indictment shows it was returned on the 20th day of December,

1916, and the allegations in the indictment are that the acts were committed before that, before the returning of the indictment. The substance of the indictment—I think the gentleman is correct there, that we would not have a right to amend the substance of the indictment, but this matter is merely the opening of the indictment. It has nothing to do with the material part of the indictment; and under section 1025, that is a mere error in form and does not affect the rights of the defendants in any way.

And before the court rules upon the motion, I desire to introduce the records of the court, showing when the grand jury was empaneled, of which Gail B. Johnson was the foreman, and when the indictment itself was returned into court. And if the court sees proper, or feels that it is necessary, we will ask to change that word "January" to "July." It is very plainly a clerical error.

THE COURT: What does the record show?

MR. PALMER: The record will show that the grand jury was empaneled at the second—

THE COURT: In July, 1916?

MR. PALMER: In July, 1916, and Gail B. Johnson was appointed foreman of that grand jury.

THE COURT: So that this indictment was returned after that date?

MR. PALMER: And that afterwards, on the 20th day of December, 1916, this indictment was returned, upon the day that it was filed, yes sir.

MR. ROGERS: I think that counsel misapprehends the point. I think the clerical error consists, if it be one, in not the caption of the indictment, but many

of the substantial allegations of the indictment. I have no doubt that the grand jury of which Gail B. Johnson was foreman, the records will show was impaneled at a certain time; but, nevertheless, the indictment shows all the way through, a mistake, if it be one, or the allegations, if they are material at all, continue all the way through the indictment; and, therefore, it is a matter of substance, and not merely a matter of caption.

MR. PALMER: I think that there is no error that is contained in the body of the indictment; it is merely in the caption. I think that the dates, all of them, agree with the statement that I have made as to what the record will show.

THE COURT: This indictment was returned on December 20, 1916. Now, the conspiracy is alleged to have occurred January 1st, 1916, and the overt acts set forth are on May 20, 1916, April 13, 1916, May 18, 1916, March 24, 1916, March 16, 1916, March 25, 1916, March 23, 1916, March 25, 1916, and so on. Suppose that the indictment started in at the second paragraph, "The grand jurors of the United States of America, chosen, selected and sworn, within and for the division and district aforesaid, on their oaths present." Would not that be a good indictment, leaving out that first paragraph?

MR. ROGERS: I don't think so.

THE COURT: I will overrule the—motion, is it, or objection?

MR. ROGERS: Both, sir; one motion and an objection.

THE COURT: Well, the objection will be over-

ruled, and the motion will be overruled, and an exception allowed to the defendants.

MR. ROGERS: Your Honor will permit us to enter an exception to each order.

THE COURT: Yes. Proceed, Mr. Palmer.

MR. PALMER: Now, your Honor, we ask to amend the caption.

THE COURT: By what authority can you amend an indictment?

MR. PALMER: We are not asking to amend the indictment. We are asking to amend the caption.

THE COURT: I don't know anything about that. You want to change "January" to "July."

MR. PALMER: To July.

THE COURT: On the second Monday of July.

MR. PALMER: First, I will ask to introduce the record.

THE COURT: I understood you had introduced them. Have you got the records here?

MR. PALMER: Yes sir.

THE COURT: When was the July grand jury impaneled?

THE CLERK (MR. WILLIAMS): The 24th of July, 1916.

THE COURT: The 24th. That would not be the second Monday.

MR. ROGERS: No, sir.

THE CLERK (MR. WILLIAMS): The term began on the second Monday.

THE COURT: The term began on the second Monday in July.

THE CLERK (MR. WILLIAMS): Yes, sir.

MR. PALMER: Yes, sir.

THE COURT: By what authority, Mr. Palmer, do you want to amend?

MR. PALMER: I have a case here, United States against Howard, in the 132nd Federal Reporter, in which the same question arose.

THE COURT: Who made the opinion?

MR. PALMER: The opinion is written by Hammond, Judge.

THE COURT: District Court?

MR. PALMER: Yes, sir, the District Court in the Western District of Tennessee.

MR. ROGERS: I did not get the book and page.

MR. PALMER: 132 Federal, and the case begins at 325, but I shall read at 343. I will begin at 342.

The grounds of the demurrer now being considered present two other very important questions as to the sufficiency of these indictments, but, in view of what has already been said upon the subject of necessity for swearing witnesses, it is thought to be hardly necessary to consider or decide them. First it is objected that it is nowhere alleged in the indictments by what court or before whom the suborned witnesses were sworn; secondly, it is objected that it is not alleged that the court or person administering the oath had authority to administer the same. However, it may be well enough to point out the bearing of these two objections upon that which has just been disposed of. As before, it is conceded that these indictments do not in specific terms designate the court before which the alleged perjury was committed, nor in which the

issue was pending to which the indictments relate, unless we can refer to the caption of these indictments in aid of this omission, and it is the contention of the district attorney that we may do this. The caption, it will be observed, from the copy of the indictment *supra*, designates the court with technical particularity in which these indictments were found. But this is wholly beside the question, which is not in what court these indictments were found, but in what court were the perjuries committed—an altogether different matter and a matter of acknowledged substance. The presiding judge here knows outside of these indictments that the alleged perjuries were committed in the court designated in the caption of these indictments because he presided at the Howard trial, which took place in that court; the learned counsel for the defendant also knows that fact outside of these indictments, because he defended Howard then as now; and the public history of those trials, and the records of this court designated in the caption, show that those trials took place in that court. But it is obvious that such knowledge as this cannot aid the insufficient averments of these indictments. Again, we also judicially know that contemporaneously with the sitting of the United States District Court for this district at Jackson at the time of the Howard trials—that being the court mentioned in the caption of these indictments—there was another court of the United States sitting, which had, under the law, concurrent jurisdiction of the offenses for which Howard was being tried. The indictments against him for the criminal misuse of the mails might have been found in the Circuit Court,

trials might have taken place in that Court, and the perjuries of the suborned witnesses might have been committed in that court. Therefore it goes without saying that these indictments should definitely state in which of these two courts the trials were had and the perjuries committed. Now, then, the caption of these indictments relied upon by the district attorney as a sufficient averment that they took place in the District Court, and not in the Circuit Court, does not in itself show or tend to show that fact. It does show that these indictments for subordination of perjury by Howard were duly and lawfully found and presented in that court. The technical commencement of the indictments also shows that the grand jurors were duly elected, impaneled and sworn, and that upon their oaths they made the presentment of the grand jury to that court in a lawful manner. But this is the only function belonging to the caption and commencement, for it seems well settled that, while they constitute a part of the record of the criminal proceeding against Howard for subornation of perjury, they are not technically or substantially a part of the indictments themselves. 1 Enc. Pl. & Pr. 693; 10 Enc. Pl. & Pr. 418, 419, 421, 424, 425, 428; arch. Cr. Pl. 26; 1 Chit. Cr. 226; 1 Bish, Cr. Pro. (3rd Ed.) 653, 551, 662, and notes; Id. (1st Ed.) 154.

These authorities also show that the common-law prohibition against any amendment of the indictment does not apply to the caption or commencement, for the very reason that they are not a part of it. They are exempt from that rigor which obtains even now in matters of substance against amendments only, because

they are so wholly outside and apart from the indictment itself. The district attorney has not cited a single case which decides that you may look to the caption or the commencement to aid imperfect or uncertain allegations in the body of the indictment."

I would be willing to rest the matter, though, Your Honor, upon the introduction of these records, without the amendment.

THE COURT: Well, I don't think there is any amendment necessary. I think the first paragraph of the indictment is wholly unnecessary to a good indictment.

MR. PALMER: With the understanding that these records have been introduced—

THE COURT: I understand they have been introduced.

MR. PALMER: Yes, and that they show that this grand jury was impaneled—

MR. ROGERS: Pardon me, Mr. Palmer. I object to the introduction of the records. I do not object upon the ground that they are not produced, or that they are not read, or any matter of that sort, but I object upon the ground that my position is that this court has not the right to consider the matter in this form; that they are immaterial and irrelevant at this time; and that this court has no jurisdiction or right to amend an indictment or to change its averments; and therefore the records would be immaterial and irrelevant, and for that reason I object. But I do not object upon the ground that the records are not produced, and I waive any question that there may be about the regularity of them, or anything of that sort.

MR. PALMER: And also you will stipulate that the records show that the grand jury—

MR. ROGERS: I do not doubt your statement as to what the records contain in any way.

THE COURT: The records, as I understand, show that this grand jury was impaneled in July, 1916, that returned this indictment; that it was impaneled on the second Monday of July, 1916, instead of on the second Monday of January, 1916.

MR. PALMER: That is, that the term began on the second Monday.

THE COURT: The term began on the second Monday of July, instead of the second Monday of January.

MR. PALMER: Yes, and that Gail B. Johnson was appointed the foreman.

THE COURT: And the record shows that Gail B. Johnson was foreman of that grand jury so impaneled in July, 1916. It is my opinion that the first paragraph in this indictment, reading as follows: "At a stated term of said court, begun and held at the city of Los Angeles, county of Los Angeles, within and for the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and sixteen," is surplusage, and not necessary to the validity of the indictment. I am further of the opinion that if that paragraph is necessary to the validity of the indictment, the court will take judicial notice that this indictment was returned by the grand jury impaneled in July, 1916, and by such a jury, and that the term of court began on the second Monday of July instead of the

second Monday of January. The application to amend the indictment will be denied.

MR. ROGERS: We desire an exception to the ruling of the court, not upon his refusal to allow an amendment, but upon his ruling as to the sufficiency of the indictment.

TESTIMONY OF SALLIE MARGARET CLAXTON FOR THE GOVERNMENT:

Sallie Margaret Claxton, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows: (page 29 of Reporter's Transcript)

My name is Sallie Margaret Claxton. I live at the Belmar Hotel in this city. I am married and have been married for five years. In March, 1916, I worked at the Regal Theater in Los Angeles as chorus girl. I had been working as chorus girl for seven or eight years before my marriage, traveling with theatrical companies in Texas, New York, Chicago and other places. I know all of the defendants except F. B. Beyer and I only know him to see him. I first met Warren Fabian at the Regal Theater. I first saw Mr. Beyer at Calexico—then at Mexicali in a cafe. I don't know what position he occupied. I had no business with him whatever.

Q. (Transcript, P. 34) Now, did you have any conversation with the defendant Warren Fabian about going to Mexicali?

MR. ROGERS: That is objected to as incompetent, irrelevant and immaterial, and no foundation has been laid. I think the same objection that the authority of Mr. Fabian has not been shown to bind the others, and

(Testimony of Sallie Margaret Claxton.)

particularly with respect to a conversation he may have had, in view of the concession of counsel that the so-called conspiracy evidence will consist of employment to do certain things in a certain way—in other words, he was an employee, and therefore bound by the terms of his employment, until some conspiracy of another sort is shown, if counsel can do it; but I think that ought to be shown first, and the foundation laid.

THE COURT: Well, the evidence is undoubtedly admissible against Fabian, and would not bind the others unless it is shown that a conspiracy existed prior to the time that it was done, and existed at that time, and that this was part of the scheme, or in furtherance of it, or something, or part of the *res gestate*.

MR. PALMER: Of course, your Honor, if we would offer the suggestion—

THE COURT: The objection will be overruled. Proceed.

MR. ROGERS: Except.

MR. PALMER: Just read the question.

(Question read.)

A. Mr. Fabian was just at the theater, and he asked me if I would go down, and I told him I didn't—

Q. Now wait. Go down where?

A. Down to Mexicali.

Q. Tell just what he said to you.

A. I told him I didn't know whether I could go or not, on account of my mother; that I would ask her and let him know later.

Q. Do you know about when that was?

(Testimony of Sallie Margaret Claxton.)

A. Well, I was only down there two weeks, and it was just the last week in May and the first week in June.

Q. That you were down there?

A. Yes, sir.

Q. BY THE COURT: How long prior to the time you went down there did you have this conversation?

A. About a week before I went, I think it was.

Q. BY MR. PALMER: Now, did he tell you at that time anything about what your duties would be?

A. Yes sir.

Q. Now, state what he told you.

A. He told me that the salary would be \$25 a week, and that I was to work in the chorus, and that if I wanted to I could work on the dance floor, and if I didn't, I didn't have to.

Q. Well, did he tell you about what was there on the dance floor?

A. No sir, only the dance floor, the drinks, and commission on drinks.

Q. What if anything did he say to you about commission on drinks?

A. He said I got 40 per cent on everything but Schlitz, and that was 50 per cent.

Q. Do you think of anything else now he told you at that time?

A. No, sir.

Q. Was anything said to you at all about how you would go down there?

A. Why, take the train.

(Testimony of Sallie Margaret Claxton.)

Q. Yes, but how about the fare; anything said about that?

A. No sir; I asked Mr. Malone if he would let me have a little money to give to my mother, and he gave me fifteen dollars.

(Page 40 of Transcript) Q. You bought your own ticket?

A. Yes sir.

Q. Where did you get your money to buy that ticket with?

A. I was working at the Regal Theater, and I quit on Sunday and I had twelve dollars coming. I went to the depot by myself and caught a train, and arrived at Calxico.

Q. Mr. Malone, though, had given you fifteen dollars prior to that?

A. Yes sir,—not for that, no sir. I asked him for it to send home to my mother.

Q. But he had given you the fifteen dollars prior to your buying this ticket; that is correct, is it?

A. Yes sir.

Q. That is correct, is it?

A. He gave it to me to send home. I never said anything about a ticket.

(Page 45 of Reporter's Transcript) Q. You went then to the Owl Cafe?

A. Yes sir.

Q. What was the first thing that you came to when you went up to the entrance of that Owl Cafe?

A. The gambling tables was in front, where you had to go through.

(Testimony of Sallie Margaret Claxton.)

(Page 47 of Reporter's Transcript) Q. BY MR. PALMER: Mrs. Claxton, as you went into the room was the bar on the right or the left?

A. It was on the right, if I remember quite well.

(Page 48 of Reporter's Transcript) Did you see women drinking at the bar?

A. Yes sir.

Q. And standing with men at the bar, drinking?

A. Yes sir.

Q. Now when you passed through this gambling room, what was the next room you came to?

A. Why, it was the dance floor.

(Page 53 of Reporter's Transcript) Q. Now when you went into the place in the first place, you went onto the dancing floor?

A. Yes sir.

Q. And then did you go on to a dressing room?

A. Yes sir.

Q. Now where was that dressing room?

A. Right back of the orchestra, and the orchestra was right in the middle of the dance floor, way back.

Q. Back at the far side of the dance floor, away from the front room?

A. It was right in the center, the orchestra was, right in the back; and then there was a door right beside the piano, and the first room was our dressing room.—

Q. Now in that place did you all use one dressing room?

A. Yes sir, all the girls.

Q. All the girls used the same room?

(Testimony of Sallie Margaret Claxton.)

A. Yes sir.

Q. And beyond that was there any other door?

A. There was rooms back there, but I don't know what was back there, because we was never allowed back there.

Q. The door was right by your dressing room door?

A. Yes sir; there was just a little wall, and then this door.

Q. And your dressing room door was right here at the left, and this other door was—

A. The hall run right straight down.

Q. Right straight back?

A. Yes sir.

Q. Now how was the chorus dressed when it performed?

A. Why, sometimes we had on long dresses, and sometimes we had on dresses that came to our knees.

Q. Were they at any time performing in skin tights, as they are called?

A. No sir; we didn't wear tights; we wore stockings.

Q. What were your working hours?

A. From 7:30 until 3.

Q. From 7:30 in the evening?

A. Until 3.

Q. Until 3 the next morning?

A. I think that is what it was.

Q. You would give two performances in that time?

A. Yes sir.

Q. Between those times what were you doing?

(Testimony of Sallie Margaret Claxton.)

A. Working on the dance floor if we wanted to, and if we didn't we could sit in the dressing room.

Q. After you had changed your clothing, what did you do on the floor?

A. Go back out on the dance floor and dance.

Q. With whom?

A. With men that was in the cafe.

Q. If men asked you to dance, you would dance with them? A. Yes sir.

Q. What, if anything, was done with regard to having the men to drink?

A. There wasn't anything done. They danced, and then they went over to a table and sat down.

Q. Would the girls ask them to drink?

A. No sir.

Q. They got a per cent. on the amount that was sold, didn't they?

A. Yes sir.

Q. BY MR. PALMER: Now did you see other women there besides the girls in the chorus?

A. Yes sir.

Q. Do you know where those women stayed?

A. Back in the back part of the place, some place.

Q. Do you know what their business was there?

A. No, I know that men went back there.

Q. When you would dance on the floor, did these women dance on the floor at the same time you did?

A. Yes sir, at the old place they did.

Q. (Page 58 of Reporter's Transcript) Now, had you, before you went down there, had you ever practiced prostitution? A. No sir.

(Testimony of Sallie Margaret Claxton.)

Q. Do you know whether there were other rooms in the rear of the dance hall besides the ones that were off from the door that opened right near your dressing room? A. No sir.

Q. Now, you went with men to the tables.

A. Yes sir.

Q. —to drink—Did you ever go to the tables with men to drink? A. Yes sir.

Q. And did you get a percentage from those drinks?

A. Yes sir.

Q. When you went to the tables to drink, did you drink with the men?

A. Not all the time, no sir.

Q. You did some of the time?

A. Yes sir.

Q. Now you lived all the time where?

A. Over at the Virginia Hotel, in Calexico, California.

Q. Now when you were there on the dancing floor, did you at any time see any men that you had danced with or had drunk with going with women back into these rooms *back*?

A. I never noticed a man that close.

Q. You do know, though, of seeing men going back there with those women that lived back there, or stayed back there?

A. Yes sir.

Q. You knew what they were going back there for, didn't you?

A. Why, it was plain enough to be seen.

(Testimony of Sallie Margaret Claxton.)

Q. Anyone could see what that was?

MR. ROGERS: I object to that as calling for a conclusion or opinion, and incompetent, irrelevant and immaterial.

THE COURT: The objection will be sustained.

MR. ROGERS: I move to strike out that answer, "It was plain enough to be seen," as incompetent, irrelevant and immaterial and not responsive.

MR. PALMER: I think, your Honor, that it is not open to that objection.

THE COURT: Well, I would not sustain the position of the United States Attorney on that proposition. I think the evidence, however, is material, and a proper answer, and a proper case for the witness to give an opinion on. The motion will be denied.

MR. ROGERS: Exception.

Q. BY MR. PALMER: How many women were there that stayed in the rooms back of the dance hall that you speak of?

MR. ROGERS: Objected to.

A. I couldn't tell you.

Q. BY MR. PALMER: Was there more than one?

MR. ROGERS: Objected to.

A. Yes sir.

MR. ROGERS: I think the witness has plainly stated that she has never been back there, and she never went back of that dressing room, and I don't think she can tell from her own knowledge how many women did live back there, or stayed there, as counsel says now, and it is incompetent, irrelevant and imma-

(Testimony of Sallie Margaret Claxton.)

terial. The witness answered so quickly I could not object.

THE COURT: Well, I will not regard that, Mr. Rogers. If I thought the evidence was immaterial or impertinent, I would strike it out, but I think the answer is—the question and answer are both appropriate. The jury will judge the materiality of it, or the weight of it, I mean.

..MR. ROGERS: We except.

Q. BY MR. PALMER: During the time that you were there entertaining and dancing on the dance floor in that old place, were any indecent proposals made to you upon the floor of that dance hall by men with whom you were dancing and drinking?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion or opinion, and no foundation laid.

THE COURT: Well, Mr. Palmer, it seems to me like it is calling for what is known as a conclusion and the witness' opinion, as to whether or not any proposals made to her were indecent; and it seems to me like the defendants would not necessarily be bound by what their guests did, as far as the conspiracy was concerned. I will sustain the objection to the question.

MR. PALMER: If the court will pardon me, I will put another question, however, along the same line, Mr. Rogers.

MR. ROGERS: Well, if your Honor pleases—

MR. PALMER: That is not open to an objection that is suggested by the Court.

MR. ROGERS: Well, go ahead.

(Testimony of Sallie Margaret Claxton.)

THE COURT: Proceed Mr. Palmer.

Q. BY MR. PALMER: While you were there in that old place and dancing with men upon that dance floor, and in the place where you were drinking with them, were you solicited by the guests of the house, or any of them, to have sexual relations with them?

MR. ROGERS: I object to that as incompetent, irrelevant and immaterial, hearsay, and not within the issues, and no foundation laid, and not binding upon the defendants, any more than my friend Schenck would be bound if some rascal spoke to a woman in the Nat Goodwin Cafe. I don't believe they could be bound.

THE COURT: I will hear from you Mr. Palmer, on the proposition.

MR. PALMER: The charge in the indictment is that these men conspired to take these girls to a place where they would be debauched and where they would be subject to debauchery. Now, however, these defendants may have guarded their contracts with these girls, I deem that if they have taken them to a place where prostitution was being practiced by women on the floor, and associated them with prostitutes on the floor of the dance hall, so that they would be solicited to have illicit sexual relation with men, that then they have been guilty of a violation of the law that brings them to a place where they will be subject to be debauched. The charging part of the indictment is—

THE COURT: Where are you read²¹² from now?

MR. PALMER: I intend to read, your Honor, beginning with page 2, at line 14.

(Testimony of Sallie Margaret Claxton.)

THE COURT: "To-wit."

MR. PALMER: After "to-wit." "For the purpose of debauchery, to-wit, for the purpose of acting as entertainers and chorus girls, that is to say, singing and dancing in a certain building in Mexicali, in the Republic of Mexico, which said building would be known as the Owl Cafe, and the ground floor of said building where said women and girls would act as entertainers and chorus girls as aforesaid would consist of one large room with a certain space set aside for a dance hall and certain space set aside for a gambling hall, and certain space set aside for a bar where intoxicating liquors would be sold, and a certain space would be set aside for tables and chairs where intoxicating liquors would be drunk; and leading off from said ground floor of said building there would be two hallways on either side of which said hallways there would be small rooms, commonly termed cribs, where various and sundry other women and girls, whose names are to the grand jurors unknown, would engage in the practice of prostitution, that is to say, would engage in sexual intercourse with men other than their husbands, and it would be part of the duty of said women and girls aforesaid"—

(Page 65 Transcript) Q. BY MR. PALMER: Were there any restrictions placed on the girls drinking? A Beer was the only thing that they served to the girls.

(Page 66 Transcript) Q. Have you seen members of the chorus there intoxicated? A. No sir.

(Testimony of Sallie Margaret Claxton.)

Q. Never saw any of them intoxicated?

A. No sir.

Q. What kind of dancing was had on that floor?

A. Just the same kind of dancing as you see in any public dance hall.

Q. Well, what?

A. Waltz, two-steps, one-steps.

(Page 67 Transcript) Q. And you have seen intoxicated men there on the floor? A. No sir.

Q. Did you ever see any men there intoxicated?

A. Not on the dance floor, no sir.

Q. You have seen them there, though, in the building?

A. Out in the front and out in the street.

Q. Not on the benches, not at the tables?

A. None back in the dance floor, no sir; they didn't allow it.

(Page 68 of Transcript) Q. Did you ever see any conduct there by any of the girls towards the men that was indecent in its character?

A. No sir.

(Page 70 of Transcript) Q. Would other girls come there, except the chorus girls, to dance?

A. Yes sir.

Q. And besides the girls that were employed in these side places, associated with the institution?

A. I don't just understand.

Q. Well, would girls come from the village in there to dance?

(Testimony of Sallie Margaret Claxton.)

A. Yes sir, I saw quite a few strangers in there, women that I never seen before.

Q That did not belong to the cafe?

A. Yes sir.

Q. To what extent would those women come in there?

A. Have a drink and dance.

(Page 71 of Transcript) THE COURT: Mr. Rogers, I will hear from you on this question of the admissibility of the evidence, what the guests said to this lady.

MR. ROGERS: In my judgment, if your Honor pleases, the question—

THE COURT: Stipulate the jury is present?

MR. ROGERS: I do, yes sir.

MR. PALMER: So stipulated.

MR. ROGERS: In my judgment, if your Honor pleases, the question here is the personal debauchment of any of the persons named in the indictment, as the subject of the violation of the Mann Act. Now, it is true if there was any debauchment, if there were any instances of debauchment, of which the defendants were cognizant, or which they permitted, I venture to say that it is admissible under the allegations of the indictment. But there might be isolated instances here and there, without the consent of the defendants, not in their presence, not in their hearing, which would not bind them or affect them. In other words, a matter of that sort might occur to any woman at any place. Now, I want your Honor to understand my position. If by virtue of anything the defendants did,

(Testimony of Sallie Margaret Claxton.)

if by virtue of any things they told her to do, she became the subject, as a matter of business, or as a matter of the direction of the defendants, to any solicitation for debauchment, that would be admissible. In other words, if she, by reason of any acts of the defendant, was put in a place where they intended she should be, or they had reason to suppose she would be the subject of solicitations for debauchment, I venture to say that would be admissible. But isolated instances which could not be prevented by the defendants, which was not within their purview, or not intended by them, then this question is altogether too general.

Now, I will say to your Honor, it is my view that counsel may introduce any instances of debauchment on the part of any witnesses which was brought about by the acts of the defendants, which they were cognizant of, which their acts, as a matter of fact, did lay the foundation for. I think that is within the purview of the indictment. To say simply at any time under any circumstances, in any occasion, were you subject of solicitations, that I think is altogether immaterial and not binding upon the defendants themselves. I trust I have made my position clear.

THE COURT: I think I understand you. My idea about it is if this lady had actually participated in the—what seems to occur there back of the stage that that would be a fact that would be appropriate in this case. Now, it seems if she were solicited by the guests to go back there in those cribs, that would be evidence from which the jury might draw the conclusion, if

(Testimony of Sallie Margaret Claxton.)

they saw fit, that the defendants were cognizant or knew that this thing might happen. Now, every man knows—we all know that the solicitation of a woman to become immoral may occur anywhere on earth; it may occur in any restaurant, or in any parlor, and yet it might be simply an isolated instance, and the proprietor of such cafe or parlor would not be cognizant of it and would not be chargeable with the offense that is committed there. And the jury will have to judge, it seems to me, whether or not this evidence has sufficient weight to determine that the defendants knew that such a thing would occur. It is a question of weight and not of materiality, and if there is a special instruction needed upon the subject, after what I have said, I will have to give it to the jury, because I think it is a question of weight rather than materiality.

MR. ROGERS: Might I interrupt your Honor for a moment?

THE COURT: Yes sir.

MR. ROGERS: I do not differ from your Honor's view at all. I think it is the view I tried to express, but your Honor expressed it more succinctly than I did. But my position is this: These defendants cannot be bound by isolated instances which, as your Honor just has observed, might occur in any circumstance. If, however, they placed this young lady intentionally and made no protection for her, gave her no opportunity to protect herself against those matters, that, as your Honor observes, is for the jury to determine whether they are bound by these matters,

(Testimony of Sallie Margaret Claxton.)

and as your Honor observed, it is a matter which the jury may consider, whether or not it does bind the defendants.

I might say there might be instances of solicitation—I can imagine instances of solicitation which would bind the defendants if they occurred. But I think counsel's question as it was put, would have a tendency to bind the defendants to matters which they were not in any wise responsible for, and if your Honor thinks that may be governed by special instruction, I submit I think possibly any harm that might come from the admission of immaterial matter, might, perchance, be obviated by such an instruction.

It is not charged in any wise that these defendants were guilty of any solicitation, and that they should be bound by isolated instances. It certainly is not the law. But I submit that counsel should reframe his question in such fashion, or in such manner as to come within your Honor's very plain ruling, which I think is a correct ruling.

MR. PALMER: I think, your Honor, that every man is presumed to intend the reasonable consequences of his acts, and if these defendants have been guilty of taking these girls and putting them in places where the reasonable consequences of that act they must be presumed to know that they will be solicited.

SALLIE MARGARET CLAXTON, recalled.

DIRECT EXAMINATION, resumed.

THE COURT: Repeat your question.

Q. BY MR. PALMER: Mrs. Claxton, at the time that you were employed in the Owl Cafe, were you

(Testimony of Sallie Margaret Claxton.)

while you were engaged in that employment on the dance floor, and about that house, at any time solicited by men to have illicit sexual relations with them?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial, no foundation laid; hearsay so far as the defendants are concerned; and the time and place and persons present not stated; no foundation laid, in that the defendants are not shown to have had any relation to the matter.

THE COURT: The objection will be overruled.

MR. ROGERS: Note an exception.

MR. PALMER: Read the question.

(Last question read by the Reporter)

A. NO sir.

Q. What was said to you, if anything, at the time you had the conversation with Dan Malone in Los Angeles about how much the expense was on a trip to Calxico?

MR. ROGERS: That is objected to upon the ground that no foundation has been laid for it; it is leading and suggestive. I will not object, except on the part of other defendants, for the lack of foundation to a question which would show what did Mr. Malone say, but it is leading and suggestive.

THE COURT: The objection will be overruled.

MR. ROGERS: Note an exception.

MR. PALMER: Read the question.

(Last question read by the Reporter)

A. Why, Mr. Malone never said.

Q. Was anything said to you by Mr. Fabian about the cost of a trip?

(Testimony of Sallie Margaret Claxton.)

A. No sir.

Q. Nothing was said to you at all by anyone about how much it would cost you to go?

A. No sir; they never even told me the depot that I went at.

Q. Did you sign a written contract with them?

A. After I was ~~down~~^{here} there, yes sir.

Q. And where is that contract?

A. Why, I really don't know.

Q. BY THE COURT: Did you have a copy of it?

A. I think I did. I am not—

Q. What became of it?

A. I am not sure I had one, or not. If I did, I lost it or destroyed it, because I never thought anything more about it.

Q. BY MR. PALMER: Who signed that contract with you?

A. I don't know whether it was Mr. Malone or Mr. Fabian.

CROSS-EXAMINATION (P. 83 Transcript)

Q. BY MR. ROGERS: Now, was there anything further said by any of the defendants concerning your going down there, any solicitation made for you to go, or any inducements held out to you in any way, except what you have given?

A. No sir.

MR. PALMER: We would object—

MR. ROGERS: I beg your pardon.

THE COURT: Proceed, Mr. Rogers.

Q. BY MR. ROGERS: Then how long after you spoke to these men was it that you went?

(Testimony of Sallie Margaret Claxton.)

A. About a week, I think.

Q. About a week. Did you communicate with them, and tell them you were coming?

A. No sir.

Q. You went alone?

A. Yes sir.

Q. Did anyone take you to the train?

A. No sir.

Q. Or accompany you on the train?

A. No sir.

Q. Did anyone meet you when you got there?

A. No sir.

Q. When you got there, I believe you said you merely inquired the way to the hotel?

A. From an old man, an old Mexican man.

Q. Did anyone accompany you across the line?

A. No sir.

Q. Did anyone take you into Mexicali?

A. No sir.

Q. You walked over yourself?

A. Yes sir.

Q. Then you rehearsed that afternoon?

A. Yes sir.

Q. What did you rehearse?

A. Dancing numbers and the music to the songs.

Q. Now, "Dancing numbers," what do you mean by that? Do you mean show dancing?

A. Certainly.

Q. You had done that before? A. Yes sir.

Q. And had sung before in public places?

(Testimony of Sallie Margaret Claxton.)

A. Yes sir.

Q. Was there any special book given you—that is, any sort of a play read at that time for you to—

A. No sir.

Q. You were told what numbers you were to sing?

A. We stood at the piano and learned the songs off the music.

Q. You stood at the piano and learned the songs off the music? A. Yes sir.

Q. Then the director, or Mr. Fabian, had the songs written out and played them for you?

A. They bought the music and put it on the piano, and the piano player played it there.

Q. The piano player played it and you learned it there? A. Yes sir.

(Page 95 of Reporters Transcript) Q. Were you told anything about your conduct by any person, what you must do, and how you must conduct yourself?

A. No sir. I was told that nobody would bother me and I would have protection.

Q. You would have protection? A. Yes sir.

Q. Who told you that? A. Mr. Fabian.

Q. And where was that said to you?

A. At the front of the Regal Theater.

Q. And as a matter of fact, when you got down there, was anything said about your coming back over onto the Calxico side each night?

A. That I must come right straight across the line and not stop. I ate over in Mexicali, and as soon

(Testimony of Sallie Margaret Claxton.)

as we had our dinner, we should eat alone, and come right straight across the line alone.

Q. Then you went over to the cafe for your meals?

A. Yes sir.

Q. When was your dinner served you?

A. We had dinner at 6 o'clock, and then we had lunch at 12 o'clock, and then I ate just after I got out.

Q. Just after you got out? A. Yes sir.

Q. And where did you eat?

A. I don't know the name of the cafe; right next door to the theater.

Q. Well, it is managed by the same people?

A. Yes sir.

Q. Owned by the same people? A. Yes sir.

Q. And at that time, you say you were told that you must come right straight back over to the California side? A. Yes sir.

Q. Were you told anything about your conduct with respect to men, what you must do with respect to them, and what they would insist upon your doing?

A. Yes sir.

Q. What was it?

A. That if any man insulted us, we would tell him that we was not there for that purpose, that there was other people, and never to make a date with a man either in the theater or out, or on the American side.

Q. Or on the Mexican side, either? A. No sir.

Q. Not to make a date. By that, you mean an appointment with a man? A. An appointment.

Q. Now, during the time you were down there, did

(Testimony of Sallie Margaret Claxton.)

you make any appointment with any man? A. No sir.

Q. Did you commit any act of debauchery or immorality at that time at all?

MR. PALMER: We object to that question, your Honor, because it calls for a conclusion of the witness, and is asking for an answer to the very proposition that the jury is trying.

THE COURT: It looks to me, Mr. Rogers, that it is calling for a conclusion of the witness. I think the proper thing is to let her state what she did. You may ask her leading questions.

Q. BY MR. ROGERS: With respect to any sexual relations with a man, either on the Mexican side or the American side while you were down there, did you have any such relations? A. No sir.

Q. Were you at any time approached or solicited in any way by any of these defendants, or anybody connected with the Owl Cafe?

A. No sir.

Q. As a matter of fact, you have said you were told if any man said anything to you that you were to say certain things. As a matter of fact, were you told anything about any protection that would be afforded you? What was said about that?

A. I don't just understand you.

Q. Well, I mean to say, state whether or not you were told anything about being furnished with an escort back and forth, or anything of that kind?

A. No sir; we were just told to tell them not to bother us.

Q. Not to bother you. Now, at any time during

(Testimony of Sallie Margaret Claxton.)

your engagement over there, did you ever go back of your dressing room? That is, to the rear?

A. No sir.

(P. 99 of Transcript) Q. You said you were not permitted to approach any of those tables.

A. No sir.

Q. You were not permitted to gamble in any way?

A. No sir.

Q. Or to go up where the men were?

A. No sir.

Q. Were you permitted to drink at the bar?

A. At the back end here.

Q. Back end here?

A. Right back there, yes sir.

(P. 102 of Transcript) Q. Now, with respect to that dancing, what persons danced there? State whether or not people came in, persons, parties, from the valley, and parties from outside that you didn't know, come in and dance? That is, women and men come together, take dinner, dance, and go away; things of that sort?

A. Yes sir.

Q. Describe the way the people came in there.

A. Well, they came in and they looked as if they had been traveling. As if they had just come over sight-seeing, some with automobile caps, some of the women had, and men with caps.

Q. And people from the valley there?

A. They looked as if they were traveling.

Q. And they would dance there? A. Yes sir.

(Testimony of Sallie Margaret Claxton.)

Q. Now, did you ever see meals served to these people? A. Yes sir.

(P. 103 of Transcript) Q. Now, let me ask you, as a part of the evening's entertainment, you, as a chorus, sang. Now, did any of the girls sing separately, by themselves? A. Yes sir.

Q. Solos, as it were? A. Yes sir.

Q. And dances? A. Yes sir.

Q. You did that, did you?

A. No, I did singles.

A. ~~Yes, sir.~~

Q. By singles, you mean to be alone? A. Yes sir.

Q. And others of the chorus did? A. Yes sir.

Q. Now, did you have any moving pictures?

A. Yes sir.

(P. 104 of Transcript) Q. While the moving pictures were being displayed, state whether or not there was any dancing, or anything of that kind going on.

A. Sometimes you could dance while the orchestra was playing.

Q. While the orchestra was playing? A. Yes sir.

Q. Were you told by any of the defendants, or by any person connected with the cafe, that you should dance, or that you were compelled to dance, or anything of that kind, or directed, or was it left entirely to your choice?

A. It was left entirely to our choice; we could or we could not.

Q. At any time was any direction given you about

(Testimony of Sallie Margaret Claxton.)

whether you were compelled to drink with men, or not?

A. No sir. We was not to drink any more that we could possibly help.

Q. Were you allowed to drink anything except soft drinks and beer? A. No sir.

Q. What were you told about the rule with respect to your drinking?

A. We could only drink beer, or soft drinks. They wouldn't serve anything else but that.

Q. They would not serve anything but that. Now, something has been said about some women practicing prostitution. You may state whether or not the presence of those women there on your association—you may state what the effect upon yourself, upon your view of things, and upon your desire to commit acts of debauchery, or not, your observation of these women had.

MR. PALMER: We object to that, if the court please, for the reason that it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and takes to draw from the witness testimony that is the very point in issue in this cause.

MR. ROGERS: Possibly my question is not framed as well as I would like to frame it.

THE COURT: You may ask a leading question.

MR. ROGERS: I beg your pardon, sir.

THE COURT: You have the right on cross-examination to ask leading questions.

Q. BY MR. ROGERS: At any time, did your observation of any of these women who were prostitutes, or you supposed were prostitutes—as a matter of fact,

(Testimony of Sallie Margaret Claxton.)

did your observation of them lead you to desire to commit any acts of debauchery, whatever?

MR. PALMER: Now, we object to that, if the court please, as calling for the very point in issue, incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

THE COURT: I will hear from you Mr. Rogers, if you want to argue it.

MR. ROGERS: My view is this, sir: By counsel's kind permission, I was able to speak to this lady during the noon hour, and from my conversation with her, I desire to bring out from her her statements, if so I may, that her observation, whatever she may have seen of the women who were prostitutes, so far as leading to any acts of debauchery on her part, leading to any acts of immorality on her part, had directly a contrary effect, and that she was as safely cared for, that she was permitted at no time to indulge in any acts of debauchery, and had no temptation, but so far as her observation of those things were concerned, her tendencies were directly to the contrary; she did not in any way by her association with these women, her observation of them, such association as the Government seeks to prove,—she was not in any wise affected, so far as her observation of the world and her views of the world are concerned.

Now, the purpose of the Government in introducing this evidence of these associations with these women is to show that these girls themselves were morally affected; they were morally tainted. they come in contact with leprosy, and therefore have caught it. I don't

believe they contend that any of these girls indulged in prostitution, or were induced to, or that there was any seeking that they should, but, nevertheless, their association with these women was that they would become immoral themselves.

My idea in bringing it out, is by their own statement that they have not the effect that the Government desires to show. Now, they are asking the jury to determine, from producing evidence that Mrs. Claxton did come in contact with women of ill-repute, that would have an effect of producing immorality on her part, because that is the law under the Athanasaw case, under every other case so far, and has been held to relate to the character of the person transported, and not to the general character of the world at large, not to acts of debauchery committed by other persons, but that it had the effect upon the individual transported.

Now, if the Government seeks to deduce from this evidence, and seeks to have the jury find from this evidence that Mrs. Claxton was affected by her surroundings there, I think I have the right to show from her, from her own lips, so far as that is concerned, that she was not affected morally, or to her detriment in any respect. They seek to have this jury say that because Mrs. Claxton was there, she was morally tainted, morally affected, morally injured, and I think she is the best judge of that herself. I think she can say whether or not any association or act that she did, or that she saw there, not only had no ill-effect upon her, but possibly, perchance, it had a better effect than the Government contends for.

Now, they claim that that is what they want to show,

that these women were injured. That is all they can show under the law, that these women transported were transported for sexual immorality, as respects herself. I have the same right to show from her that she was not affected by these sights, as I have to show that she committed no acts of sexual indiscretion while she was there.

MR. PALMER: Now, if the court please, in that Athanasaw case that the gentleman has recited, the court there holds that where a woman is transported to a place and put in a position where naturally, according to the usual course of events, she is subjected to association with prostitutes? and some things of that character, that that is a violation of this law, because it tends to debauchery, and for counsel to have this witness testify that she cannot see and does not know that she has been affected will in any wise tend to prove or disprove anything in the case, because the women have been there and seen the things she saw and went through the experiences that she did, does not know what effect it has had upon her; she does not appreciate what effect it had upon her. And it is not the question what effect it did have on her, but the question, did it have the tendency, was there the tendency, was she exposed to the danger that this law is made for the purpose of preventing? That is the proposition that this jury is to try. The question is whether this woman was put in a position by these defendants where these defendants knew,—they are presumed to know,—that she was injured, and that she was thrown in surroundings that would naturally debauch her mind, and where she became acquainted

with the condition of prostitutes, where she was associated with men prostitutes and women prostitutes in the closest way socially, and it cannot make any difference what this witness might say about it. It cannot affect the issues here, because it is for the jury to determine whether such conduct, whether such acts have the tendency to lower and debauch any person that is exposed to them.

And I daresay my friend himself, if he were thrown in like surroundings, would be affected by such surroundings. I will say my friend cannot get on a train and travel three days through the old south without coming out and eliminating his r's and making his a's nice and broad. It is the thing we can't control. It is the unconscious thing that comes in and destroys. It is the thing that overthrows, and it is the very thing that is to be tried by this jury; it is that this woman was subjected there to the temptations, to the sights, to the horrible conditions as she has detailed them to this jury, and for her to say that has not affected her in any way is just merely trying to say what she has been led perhaps to say in her talk—

MR. ROGERS: Oh, no, I beg your pardon; that is not called for.

MR. PALMER: And at the time, your Honor, that the witness testifies to that thing, she is testifying to the very proposition that is to be tried by this jury, and it is for the jury to find whether or not the acts proven, the surroundings, the circumstances and all, would have the effect of debauching; it is for the jury to determine, and not for this witness.

MR. ROGERS: I agree with counsel that it is for

the jury to determine, if your Honor pleases; I quite stand with him on that proposition, but as an element which they should consider in making that determination. They have the right for this young lady in her own protection, for her to say what the effect upon her was. They may not believe her; that is true. They may think, as counsel does, that she does not know how it affected her. And yet, as a part of that she has the right to say just what happened and just how she regarded things, and just whether she had been in the chorus business for some time, how she regarded these things, how it affected her, how it has been since, and how she has looked at those things.

As I say, counsel says it is the very thing to be determined; that is true; that is what the jury is here for, and yet as a part of their consideration they have a right to hear this young lady say for herself.

THE COURT: Well, now, if the charge were that she was taken there for the purposes of prostitution, it would not be necessary to prove that she actually gave herself up to prostitution. If she was taken there for the purpose, I apprehend that she would not be permitted to testify that she had no inclination. But in this Athanasaw case that you both referred to, somewhere in the case the court uses the expression that if the girl had not been of strong determination, or words to that effect, her surroundings might have induced her to fall.

MR. ROGERS: I would like to read some parts of that to your Honor; if your Honor is founding his views upon that case. I would call your Honor's attention that the Athanasaw case was in this condition : the

girl was 16 years of age; she was taken there by one of the proprietors; the proprietor that night, on her arrival, told her that she was to receive no other man but himself, and that she was to be his girl. Your Honor will find that in the decision.

THE COURT: Yes, it is here.

MR. ROGERS: And that he sought intercourse with her—that is the Athanasaw case—he sought intercourse with her that night. Why, naturally, one could not stand in the presence of any man who understood life at all and contend that is not an act of debauchery. We have no such thing here. And my view is that the Athanasaw case is directly in point, as showing in that case one of the proprietors upon this 16 year old girl, an absolutely innocent girl with no knowledge of life, no knowledge of conditions, on experience, never been in a place or theater before, nor in there, the proprietor looked her up, sought her out, told her not to receive the attentions of anybody else who tried to see her, that she was his girl, and that he would have pleasure with her. It seems to me that is a different matter.

MR. PALMER: Mr. Rogers, if you will permit me to interrupt to read from the Athanasaw case. I read from page 331. It says, "The language of the statute is directed against the transportation 'of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or give herself up to debauchery, or to engage in any other immoral practice.'"

"The instructions of the court were justified by the

statute. It is true that the court did not give to the word debauchery or to the purpose of the statute the limited *definiting* and extent it contended for by defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that someone else should do so."

THE COURT: That is the point that I had in mind.

MR. PALMER: (Continuing reading)

"In the view of the court the statute had a more comprehensive prohibition, and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in 'sexual actions.' The general expressions of the court, however, were qualified to meet and not go beyond the conduct of the defendants. The court put it to the jury to decide whether the employment to which the defendants called the girl and the influences which they surrounded her tended 'to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually.' That question, the court said, the jury should determine, and further: 'You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendants. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?' The plan and place justified

the instructions. The plan might have succeeded if the coarse precipitancy of one of the defendants and the ribaldry of the habitues of the place had not shocked the modesty of the girl. And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which the defendants contend the statute was designed to cover."

THE COURT: Now, in that case this girl testified that she was in a box and some boys came in there, four boys. They were smoking and cursing and drinking. (Reading) "I sat down and the boys asked me what was the matter; I looked scared. I told them I was ashamed of being in a place like that; and Arthur Schlemann, one of the boys, said he would take me out. The others all insisted on my staying and said I would like it when I got broke in. I tried to go out with Schlemann, but a boy named Gilbert pulled me back, saying 'Let that cheap guy alone.' Schlemann said he would send a policeman, and in about fifteen minutes Mr. Thompson and Mr. Evans came in for me."

Now, in this Athanasaw case the girl was permitted to testify that she was ashamed, and the court comments upon the fact of what was done there, the solicitation of the defendant for permission to visit the room of the girl and sleep with her, and the conduct of these boys was such that it shocked the girl to such an extent that she was ashamed. Now, I presume the object of the Government is to show that these women were not shocked when they were taken to this place. Now, whether they were shocked or ashamed

would depend upon the previous mode of life, whether they had been used to such things of that kind and knew what they were going to, and all that sort of thing.

I have held in this Mann Act it does not make any difference what the character of women is where debauchery or prostitution is engaged in; if they are taken there for that purpose, regardless of their character, it is a violation of the Act. Now, if these girls were taken down and were not shocked, were not ashamed, had power to resist, if there was anything to resist, the question is, is it proper for the girls to testify, the witness to testify, whether or not she was ashamed or shocked, whether or not her ideas of those conditions down there were such as to lead her away from that life or to it. It is more or less like the witnesses testifying, to some extent, concerning their intent. I might say I am puzzled about the question.

MR. ROGERS: My view, if your Honor pleases, if I may aid your Honor by—

THE COURT: Now, suppose, Mr. Rogers, that these girls taken down there were prostitutes, that sort of a life would not have an effect upon their ideas, and yet at the same time it would lead to that sort of thing. You take a pure girl down there, one that did not have any knowledge of the world,—suppose this 16 year old girl had been taken into such a place?

MR. ROGERS: Well, I will address myself just to the idea that your Honor has. It is apparent from this witness, a witness for the Government, that she was a professional entertainer, that as a part of this institution, as a part of this concern down there, there

was, if your Honor will permit me to divert a moment—there were other things, such as a restaurant, such as playing games, such as dancing, such as entertainment by moving pictures, such as entertainment by a chorus. I purpose to go on and show that there were other acts of an entertaining nature, a vaudeville show, and that these girls were a part of the vaudeville show, and that they were allowed—not induced or restrained—I think she has testified to that—to dance with men if she desired, not told that she must, but she could if she desired, but she must not drink anything except beer or soft drinks, as they are called, and that she must conduct herself in a certain way. Now, the whole tendency of the Act, the whole tendency of the Athanasaw decision is to put the question in a small compass, was she transported for purposes of debauchery or prostitution? No, she says not. She says she was told she must not. We have shown a contract in which she agreed she would not meet men. She says she did not meet men. Now, the question is, was she transported for debauchery in such a way as affected her? Did the harm that was done to this girl—in the Athanasaw case there was an attempt to do something that did not happen. Circumstances and the intervention of the Almighty probably prevented it. In this case the girls have the right to say that they knew what they were going there for. They were going there as entertainers. They went there with a certain idea in mind. Everything that was told them was made good, that they were protected, that they were not asked to do anything beyond what they went there for namely, entertainment; that at no time did they step over the

line of morality, and that they came away as good as they went there. Now, as a part of the testimony which the jury may consider in that behalf, we have the right to have Mrs. Claxton tell her own state of mind. Now, if they could prove, if your Honor suggests, if these women were prostitutes and were taken down there for the purposes of prostitution, then we would come under another wording of the Act, another prohibition of the Act, which is against prostitution or the purposes of prostitution. That is eliminated. The Government does not contend that these women were taken there for that purpose. It does not contend that any of the women indulged in that. And I think the Government, from their own witnesses, is compelled to admit that every safeguard in that line were thrown about these women; they were protected.

Now, it is not with the purview of the Athanasaw decision to show, just as shown here, what her state of mind was. Now, in this Athanasaw decision, which I think is given as to the effect it had upon the girl, and how she was shocked, or how it changed her mind, if it might have so done, and what the natural outcome and condition of things was after all these matters had transpired. So it seems to me that in this case we can controvert their contention by showing from the girl herself what the effect was. Now, if your Honor pleases, suppose that the Government were claiming that because of these acts which this girl saw, because of these things which she did, she did eventually go to a life of debauchery or prostitution, they would be able to show that, yes sir. If they contend that these acts tended in that direction, if they did so

establish themselves, they would be able to show it, that they had that tendency. They contend that they did those things. If they were true, they might have. Now, are we not at liberty to show the contrary? It seems to me that the converse of the proposition ought certainly be true.

THE COURT: You are going to show that did not have any particular influence on this particular witness?

MR. ROGERS: Precisely so.

THE COURT: And with the situation surrounding there?

MR. ROGERS: With respect to all the witnesses named in the indictment, and what we produce, we expect to show the same thing.

THE COURT: That is the way I understand it.

MR. PALMER: There is one other phase, if the gentleman will pardon me —

MR. ROGERS: Yes sir.

MR. PALMER: —to the issue that ought to be called to your Honor's attention. This is a charge of conspiracy, and the accomplishment of the offense is not necessary to make out the offense. I mean the accomplishment of the offense that the conspiracy charges would have been performed.

THE COURT: Well, that, Mr. Palmer, necessarily involves the question of their surroundings down there and the situation of what influence it would have on the morale of the girls that were taken there. Whether or not it would necessarily lead to a life of debauchery.

MR. ROGERS: Now, in this Athanasaw case, if your Honor will permit me just a moment—(reading) "The instructions given by the court are as follows:—"

(Testimony of Sallie Margaret Claxton.)

THE COURT: Yes. It is not necessary to read that. I have read it three or four times since this trial commenced. The gist of the instruction is down there. So far as this question is concerned, was or was not it a condition which would necessarily and naturally lead to a life of debauchery of a carnal nature in the sexual intercourse between men and woman.

MR. ROGERS: Yes, Then, necessarily and naturally, she has the right to say.

THE COURT: Then, whether or not in the opinion of this witness it would throw any light upon it, simply the effect it had upon her, would be simply her opinion about it. At the present time I will sustain the objection. If I change my mind later, I will let counsel know.

MR. ROGERS: Enter an exception.

(P. 121 of Transcript) Q. Have you committed any acts of debauchery or immorality of any kind?

A. No sir.

Q. Now, so far as the dancing upon the floor was concerned, counsel spoke to you about what dances. You did, as a matter of fact, dance. Did any of these defendants or anybody ever ask you to dance with any particular man? A. No sir.

Q. Were you permitted to choose yourself the men that you danced with? A. Yes sir.

(P. 122 of Transcript) Q. At any time did you ask any man to drink with you while you were there?

A. No sir.

(Testimony of Sallie Margaret Claxton.)

Q. I will ask you if you asked any man to buy liquor for you? Did you ever do that?

A. No sir.

Q. You never asked any man to buy any liquor for you at all?

A. No sir; I asked them to dance.

Q. Counsel spoke of the kind of men who were permitted on the dance floor. Did you ever see any man who was intoxicated permitted on the dance floor?

A. No sir.

(P. 125 of Transcript) Q. Were you allowed to receive any men in the dressing room?

A. There was no one allowed in the dressing room except the ~~girls~~ ^{gals} that worked there, but I didn't dress in that dressing room.

Q. Where did you dress?

A. Right here back of the orchestra, on the other side.

Q. On this side? A. Yes sir.

Q. What girls dressed in there the same time you did?

A. Why, Grace and Alma—

Q. Well, Grace is Mrs. Fabian?

A. Yes sir.

Q. The wife of the director of the chorus?

A. Yes sir.

Q. And by the way, did Mrs. Fabian, the wife of the director of the chorus work with you?

A. Yes sir.

(Testimony of Sallie Margaret Claxton.)

Q. During all of the time that you were there?

A. Yes sir.

Q. And did the same things that you did?

A. Yes sir.

Q. Alma, you speak of her, what is her other name?

A. Person.

Q. Person. Is she a married woman?

A. No sir.

Q. Did you know her before? A. Yes sir.

Q. When did you know her?

A. At the Regal.

Q. And what was she at the Regal? A. Chorus girl.

Q. And she did the same things that you did?

A. Yes sir.

Q. Did any of these defendants at any time speak to you about your doing any immoral thing, having any sexual relations with any man?

A. They told us we should never make a date, or anything, with a man.

(P. 128 of Transcript) Q. What was said to you with reference to your conduct? What you were to do if any man did, as a matter of fact, make any improper proposals or suggestions to you as respects reporting it?

A. Tell them that we was not there for that purpose, that there was other people.

Q. And you said, however, that no one ever did make an improper proposal to you?

A. No one ever said anything to me.

MR. ROGERS: That is all.

(Testimony of Sallie Margaret Claxton.)

REDIRECT EXAMINATION

Q. BY MR. PALMER: Mrs. Saxon, what amount of money did you receive at the end of the first week of your service in the old place from your percentage on the sales of drinks?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial, not within the issues.

THE COURT: Objection overruled.

A. Why, we cashed in our checks every night.

Q. BY MR. PALMER: Do you know how much you got for that week?

A. No sir, I don't; I never kept account of it.

Q. Do you know how much you got while you were there, the two weeks?

MR. ROGERS: The same objection.

A. No, I really couldn't say.

Q. BY MR. PALMER: What was the largest amount that you got at the end of the day during the first week while you were at the old place from the percentage on drinks?

MR. ROGERS: May my objection follow this line of interrogation?

THE COURT: Yes, sir.

MR. ROGERS: And my exception, also?

THE COURT: Yes.

MR. PALMER: Read the question.

(Last question read by the reporter)

A. Eleven dollars, I think it was—eleven or twelve; somewheres in there.

Q. What was done with the men who drank in

(Testimony of Sallie Margaret Claxton.)

that part of the house when they become intoxicated?

MR. ROGERS: Objected to as assuming a fact not in evidence, irrelevant, incompetent and immaterial, no foundation laid, no showing that any man did become intoxicated.

THE COURT: Objection overruled.

MR. ROGERS: Exception.

THE COURT: Answer the question.

A. I don't know; I guess they must have went home. There was not anybody back in there. They never stayed until they got intoxicated.

(P. 130 of Transcript) Q. Now, Mr. Rogers asked you about the situation of the dressing room, I understand you to say that the dressing room that the girls used when you were there at the old place was situated at the back of the dance hall and just to the right of the orchestra?

A. But it did not come out on the floor like that did.

Q. It was behind the orchestra?

A. There was a hall, there was a doorway right there; there was no door on it, and you stepped inside of that little door into the hallway, and your dressing room was right to the left, or right there.

Q. (Indicating on the diagram on the blackboard.) Behind the orchestra? Here?

A. Yes, sir; there was a wall, and then there was a dressing room.

Q. Now, there was a hallway in here?

A. Yes, sir.

(Testimony of Sallie Margaret Claxton.)

Q. And then here was a door that opened from the hallway into the dressing room?

A. Yes, sir.

Q. And then this hallway on down—well, what was down there?

A. I don't know; I never was back there.

Q. Don't you know that is the place where the cribs were?

A. I know I seen women going back there.

(P. 132 of Transcript) MR. PALMER: Q. Now, the hallway that you went into from the dance floor just before you entered your dressing room had other rooms along it, did it?

A. It was a big long hall, and there was women that went down this hall, and I never went back there, so I couldn't swear what was back there.

Q. Did you see men going back there together?

A. Yes, sir.

Q. Did you see them going into the rooms together?

A. No, sir, never seen them go into the rooms, because I was never back there.

(P. 135 of Transcript) Q. Your instructions, now, from whom did you get those, in regard to if men made any solicitations to you?

A. Mr. Fabian.

Q. Mr. Fabian. Now, just what did he say to you?

A. He said that if anybody insulted me—he said that I should never make a date with a man and

(Testimony of Sallie Margaret Claxton.)

never lead a man on that I would meet him, and if a man ever insulted me I should excuse myself and tell him I was not there for those purposes.

Q. And what did he say about their being others there to look after that?

A. That there was other people there for that purpose, for me not to make a date, or anything.

Q. Now, did you follow those instructions?

A. I did.

Q. Did you refer any man that suggested such a thing as that to these women?

A. No, sir, I never talked to any of the women.

Q. I know, but you referred the men to those women?

A. No.

MR. ROGERS: No, I object to that—

THE COURT: She answered No. go ahead.

A. No man ever said anything to me.

Q. By MR. PALMER: No one ever said anything to you about it? A. No sir.

Q. Did Mr. Malone ever say anything to you about that?

A. Mr. Malone never had anything to say to me.

Q. Mr. Chartran say anything to you about it?

A. No sir.

Q. Mr. Beyer?

A. No sir; I never spoke to Mr. Beyers.

Q. Never spoke to him?

A. No sir.

MR. PALMER: That is all.

TESTIMONY OF ALMA PERSON for the Gov-

Alma Person.)

(Testimony of ~~Sallie Margaret Claxton.~~)

ernment, Page 147 Reporter's Transcript. Alma Person, called as a witness on behalf of the prosecution, being duly sworn, testified as follows:

DIRECT EXAMINATION

My name is Miss Alma Person. I am 18 years old. I am acquainted with Warren Fabian. I made his acquaintance when I worked as a show girl at the Regal Theater in the City of Los Angeles. I am acquainted with F. B. Beyer and made his acquaintance in Calexico. I was one of the first girls to go down there. I went down with Mrs. Fabian, Anna Gregory and Lee Alexandria. Mr. Fabian was the first one who spoke to me about going to Calexico.

(P. 149 of Transcript) Q. Now, what was said in that conversation, and who said it?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial, and hearsay.

THE COURT: Objection overruled.

MR. ROGERS: And no foundation laid. Exception.

A. Mr. Fabian was telling me about the place down there, and asked me if I would want to go down.

Q. BY MR. PALMER: What did he tell you about it?

A. Well, he just told me—explained to me the whole place.

Q. Just tell me what he said; what did he say?

A. He said it was a dance hall and a gambling hall, and we had to work in the chorus, like entertainers down there.

*Alma Person.)**(Testimony of Sallie Margaret Claxton.)*

Q. As entertainers? A. Yes.

A. What did he say about requesting you to go?

A. Well, he said if I wanted to go, why I could go down. So I said I would go down.

(P. 151 of Transcript) Q. What was said by you and Fabian and Malone there about your going to Calexico, if anything?

A. Mr. Fabian said I wanted to go down, and Mr. Malone said it was all right, I could have the job.

(P. 152 of Transcript) Q. Do you remember about the date that you went? A. I don't remember.

Q. Do you know whether it was in March?

A. I think it was in March.

Q. What year? A. 1916.

Q. Last year, March, 1916? Now, what, if anything, was said to you, and by whom was it said, about how you should go?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial, and not binding on the defendants.

THE COURT: Objection overruled.

MR. ROGERS: Exception, please.

THE COURT: Answer the question, please.

A. I didn't understand that.

MR. PALMER: Well, I will change the question.

Q. Did Mr. Fabian or Mr. Malone tell you where to go to start?

MR. ROGERS: That is objected to for the same reasons—I beg pardon.

Q. BY MR. PALMER: (continuing) —or what did they say to you about that?

Alma Person.)

(Testimony of Sallie Margaret Claxton.)

MR. ROGERS: Objected to for the same reasons.

A. To go to Callexico? Q. Yes.

A. He said we were to go to Callexico, and live on the American side and work on the Mexican side.

Q. Was there anything said to you by either of those men about the station you were to go to, and when you were to go?

A. No, they did not tell us when; they told us when we did take a train to get off at Callexico.

Q. Was anything said to you about what railroad to go over, and when you were to start?

A. No, Mrs. Fabian took me; I went with Mrs. Fabian.

Q. How is that?

A. I went with Mrs. Fabian to the train.

Q. Went with Mrs. Fabian?

MR. ROGERS: I move to strike that answer out, because it is incompetent, irrelevant and immaterial and not binding upon the defendant, and no foundation.

THE COURT: Objection overruled, and motion denied.

MR. ROGERS: Exception.

Q. BY MR. PALMER: Now, did you receive any money at the station to pay your fare with?

A. Mrs. Fabian gave us the money.

MR. ROGERS: I object to that as hearsay, incompetent, irrelevant and immaterial, and not connected with the defendants. No issue is made on that, and no foundation has been laid, and I move to strike the

(Testimony of Sallie Margaret Claxton.) Alma Person.)
answer out. Please don't answer so rapidly. I would like to object occasionally.

THE COURT: Well, so far, the answer is immaterial. It does not relate to the defendants. She said Mrs. Fabian furnished the money.

Q. BY MR. PALMER: How much money did she give you?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial and not within the issues, and no foundation laid.

MR. PALMER: The indictment, your Honor, charges that these defendants and others were engaged in this conspiracy.

MR. ROGERS: That has not been proven. The fact it is charged does not make any difference.

THE COURT: Mr. Rogers, they could claim that Mrs. Fabian was in the conspiracy and one of the conspirators.

MR. ROGERS: I know they could claim it, if your Honor pleases, but they have ousted themselves from that claim by calling her to the witness stand a few moments ago. They know they cannot call a defendant.

MR. PALMER: She is not a defendant.

MR. ROGERS: And they must, of course, prove their conspiracy first. They cannot assume that because the indictment so charges, that a person is in a conspiracy, without any showing to that effect.

THE COURT: Well, I think it is material to show that she got the money from somebody else and did not pay her own way there, and if they can connect

Alma Person.)

(Testimony of Sallie Margaret Claxton.)

it up with the defendants, let them do it. The objection will be overruled.

MR. ROGERS: We except.

MR. PALMER: Read the question, please.

(Question read)

A. Ten dollars.

Q. How much, if any, did she give to Anna Gregory?

MR. ROGERS: The same objection.

THE COURT: Overruled.

MR. ROGERS: We except.

A. Ten dollars.

Q. BY MR. PALMER: Was she with you when you bought your ticket?

A. Yes sir.

MR. ROGERS: May my objection follow this whole matter?

THE COURT: Yes sir, you may have an objection and exception—an objection to all questions concerning the buying of this womans' ticket, and others by Mrs. Fabian, and to the ruling of the court an exception.

(P. 157 of Transcript) Q. Did you have a contract in writing in regard to your work there?

A. Yes sir.

Q. When was that made?

A. The day after I got there.

Q. At Calexico or at Mexicali?

A. I don't know where it was made out; I don't know which side.

(Testimony of Sallie Margaret Claxton.) **Alma Person.**)

Q. Was it made out in your presence? A. Yes sir.

Q. Have you a copy of that contract?

A. I think I have at home, in my trunk.

Q. In your trunk. Where is your home now?

A. St. George Hotel.

Q. In this city? A. Yes sir.

Q. I wish you would bring that in the morning.

A. I will if I can find it.

(P. 160 of Transcript) Q. When you went in there, where did you go to do your work?

A. We went through the gambling hall, and right straight back to the dance hall, up to the stage.

Q. BY MR. PALMER: When you got to the state—was there a stage in the old—

A. Not in the old place; we worked on the floor.

Q. Worked on the floor. Where was your dressing room there in the old place?

A. We went right through a little door, and as soon as we stepped in the door our dressing room was right off on the lefthand side.

Q. You went into a hallway?

A. Yes, we just stepped in.

Q. At the right of the orchestra?

A. I don't know.

Q. Where was the orchestra situated with reference to the front of the building?

A. Right in the back of the dance hall, in the middle.

Q. As far back as it could be?

A. Yes.

Alma Person.)

(Testimony of Sallie Margaret Claxton.)

Q. On the back wall of the dance hall?

A. Yes sir.

Q. Did all the girls use one dressing room?

A. They did for a while, and then when we got too many girls they had another dressing room on the side of the dance hall.

Q. On the south—on the other side?

A. Yes, on the lefthand side.

Q. On the lefthand side. How many girls were there when you got there, in the chorus?

A. When I first went down there?

Q. Yes, in the chorus.

A. Just the four of us.

Q. Just four. Did others come soon?

A. Yes sir.

Q. Was there one there when you got there?

A. No sir.

Q. Who came then immediately after, to make the fourth girl? A. Lela Caville.

Q. And others afterwards came, did they?

A. Yes sir.

Q. Who others came there?

A. I don't remember their names.

Q. Was Viola Davenport there?

A. Yes sir.

Q. While you were there?

A. Yes sir.

Q. And she was one of the chorus girls and entertainers? A. Yes sir

Q. Did she have any special act?

A. I don't understand.

(Testimony of Sallie Margaret Claxton.) ~~Alma Person.~~

Q. Did she have any special act? Would she appear in any singles?

A. I don't remember if she did or not.

Q. Lela Caville, you say, was there? A. Yes sir.

Q. Was Alma Korst there while you were there?

A. Yes sir.

Q. Was Grace Claire there while you were there?

A. Yes sir.

Q. And Grace Fay? A. Yes sir.

Q. And Anna Gregory? A. Yes sir.

Q. And Vivian de Le Mar? A. Yes sir.

Q. And Daisy North? A. No sir.

Q. You don't know Daisy North? A. No sir.

Q. Now, you may tell the jury what you did there by way of entertainment at that place.

A. What we did, you mean? Q. Yes.

A. Well, we went to work at seven thirty, and we did an opening chorus.

Q. Did an opening—

A. Opening chorus.

Q. Chorus.

A. And then we got our street—our clothes on for the dance hall, and got out and danced; and they had pictures, and most of the girls did specialties.

Q. Did you do specialties? A. Yes sir.

Q. What was your specialty? A. Specialty dancing.

Q. Specialty dancing, sometimes called acrobatic dancing, is it? A. Yes sir.

Q. Acrobatic dancing. Now, how were you dressed when you went there in your chorus work?

Alma Person.)

(~~Testimony of Sallie Margaret Claxton.~~)

A. I don't remember.

Q. Did you dance in skin tights at any time?

A. No, we had kind of long dresses on.

Q. Long dresses, and knee length dresses at any time?

A. Yes, just below our knees.

Q. You never performed there then in tights?

A. No sir.

(P. 165 of Transcript) Q. BY MR. PALMER:
Miss Person, when is your birthday?

A. August 23d.

Q. How old will you be August 23d?

A. Eighteen.

Q. This next August, you will be eighteen August 23d?

A. Yes sir.

Q. What was in the front room there of that Owl Cafe?

A. A gambling hall.

Q. And what kind of gambling?

MR. ROGERS: If she knows.

MR. PALMER: Certainly.

THE COURT: Is there any controversy about what was there and what goes on there?

MR. PALMER: Yes, your Honor.

THE COURT: All right, proceed.

MR. PALMER. I don't know that there is any controversy between the plaintiff and the defendants.

MR. ROGERS: If this witness knows, if she has

(Testimony of Sallie Margaret Claxton.) 'Alma Person.)
been permitted to—if she knows of her own knowledge,
I suppose she may testify to it.

THE COURT: I don't think she does. I think all she knows is hearsay, and what she has heard, as to the kind of games and the character of the games. I think counsel is possibly mistaken about some of the games, too.

MR. PALMER: I never was down there.

MR. ROGERS: Neither have I been down there.

Q. BY MR. PALMER: Miss Persons, were you permitted to be in the gambling part of the house?

A. No sir.

Q. Have you seen Mrs. Warren Fabian on the floor in the gambling part of the house?

A. No sir.

Q. Have you seen any women on the gambling floor of that house? A. Just slummers.

Q. How? A. Just slummers.

Q. By "slummers" you mean the outsiders that came to see the sights, is that it? A. Yes sir.

Q. BY THE COURT: Well, would the other women that were around there at the cafe be in the gambling room?

A. No sir, nobody that worked in the cafe.

Q. How is that?

A. None of the girls that worked in the cafe were allowed in the gambling hall.

Q. Well, there were other women about the Owl Cafe, weren't there besides the chorus girls; were there other women about there except those?

A. Yes sir.

Alma Person.)

(Testimony of Sallie Margaret Claxton.)

Q. That lived there? A. Yes sir.

Q. Were they in the gambling room?

A. No sir, they were not allowed in there.

(Page 169 Transcript) Q. Whom did you dance with? A. With the fellows.

Q. What fellows?

A. Well, the fellows in the dance hall.

Q. Those that wanted to dance? A. Yes sir.

Q. And did you ask men to dance with you?

A. Sometimes.

Q. And sometimes they asked you?

A. Yes sir.

Q. Did you have any arrangement by which you were to get anything upon the sale of drinks there?

A. Yes sir, we were to get a per cent.

Q. Forty per cent?

A. Yes sir, and fifty cents on Schlitz.

(P. 170 of Transcript) Q. BY MR. PALMER: Now, when you were dancing, was any effort made—did you make any effort to sell liquors?

A. No sir.

Q. Did you ever ask any man to buy any drinks?

A. No sir.

Q. How did you manage to get your percentage?

A. Oh, I would ask them to dance.

Q. How?

A. I would ask them to dance.

Q. And then after they danced, why, how would you get them to take a drink, if you did?

(Testimony of Sallie Margaret Claxton.) Alma Person.]

A. Because they knew if they danced they had to buy a drink.

Q. Oh yes; that was part of it, was it?

A. Yes sir.

Q. They knew when they danced, why they were expected then to buy drinks for you and for themselves?

A. Yes sir.

Q. Now, where were those drinks served from?

A. They were served in the dance hall.

Q. And where from? A. From the bar.

Q. Did you have waiters to come down there?

A. Yes sir.

Q. And bring the drinks. Was there a place at the bar where the girls were permitted to drink?

A. Yes sir.

Q. They would go with men there to drink?

A. Yes sir.

Q. At the bar?

A. Yes sir.

Q. They had a rail there where the girls put their foot up on, when they wanted to stand and drink?

A. Yes sir.

Q. Were there any women that were upon the floor of the dance hall besides the girls who were the chorus girls? A. Yes sir.

Q. How many?

A. I don't remember.

Q. Do you have any idea how many? A. No sir.

Q. Were there as many as a hundred? A. No sir.

Q. Fifty? A. No sir.

(Testimony of Sallie Margaret Claxton.)

Q. You don't know how many? A. No sir.

Q. What was their business?

A. I don't know.

Q. Did they dance on the floor at the same time you did? A. Yes sir.

Q. Did you receive any instructions from any one there in regard to men who solicited you, or if any man should solicit you for sexual relations what you should say? A. Yes sir.

Q. What were your instructions?

A. We were not allowed to take a walk or make any appointment with any fellows, and if they asked us anything out of the way, we were to tell them we were not there for that purpose.

Q. And what about others?

MR. ROGERS: I object to that as leading and suggestive, and I don't think it is competent.

Q. BY MR. PALMER: Was there anything further in regard to what you were to say? A. No sir.

Q. Do you know whether or not there were cribs immediately back of the dance hall?

A. I don't know; I never was back there.

Q. You were in the hall that led to those rooms that were back there, were you not?

MR. ROGERS: I object to that as calling for a conclusion of the witness and incompetent and leading and suggestive.

THE COURT: I overrule the objection.

MR. ROGERS: Exception.

A. We never went back that far.

(Testimony of Sallie Margaret Claxton.) Alma Person.)

A. BY MR. PALMER: But you went into that hallway to go to your dressing room?

A. Yes sir.

Q. You had to go into that hallway?

A. Yes sir.

Q. And your door was just the first door, was it?

A. Yes sir.

Q. After you stepped into the hallway?

A. Yes sir.

Q. And then there was a door right opposite that, was there, on the right?

A. Yes sir.

Q. Do you know whether that was a crib room?

A. I don't know; I never saw the door open, or nothing.

Q. Never saw the door open. Did you see women there that were practicing prostitution?

MR ROGERS: Objected to as calling for a conclusion or opinion, incompetent, irrelevant and immaterial, and no foundation laid.

MR. PALMER: I will change the question.

THE COURT: I think the witness has got a right to state how far she knows about it.

MR. ROGERS: We except.

THE COURT: Answer the question.

A. What is the question?

(Question read)

A. I didn't know what they were doing.

Q. BY MR. PALMER: Did you see women and men going together back into that hallway?

(Testimony of Sallie Margaret Claxton.) Alma Person.)

MR. ROGERS: The same objection as before made.

THE COURT: Objection overruled.

MR. ROGERS: We except.

A. Sometimes.

Q. BY MR. PALMER: Frequently, didn't you?

MR. ROGERS: Objected to as leading and suggestive.

A. I don't remember.

MR. ROGERS: And the same other objections I made.

Q. BY MR. PALMER: You knew there were women that occupied those rooms back there, didn't you?

MR. ROGERS: Objected to as leading and suggestive.

A. Yes sir.

Mr. ROGERS: Wait a minute, please, I am objecting.

THE COURT: The objection will be overruled, Mr. Rogers.

MR. ROGERS: We except.

Q. BY MR. PALMER: And those women came into the dance hall, did they? A. Yes sir.

Q. And danced with men there? A. Yes sir.

Q. And danced with men at the same time that the chorus girls were dancing with men? A. Yes sir.

THE COURT: Did they sit at the table and be served?

A. Yes sir.

Q. BY MR. PALMER: Did they serve drinks

(Testimony of Sallie Margaret Claxton.) Alma Person.)
there to those women when they had men with them, just like they did with the chorus girls, did they?

A. Yes sir.

Q. Did the girls have separate tables, the chorus girls and these other women?

A. The chorus girls never sat with any of the other women.

MR. ROGERS: What is that answer, please? I didn't hear it.

(Answer read)

Q. BY MR. PALMER: Were there certain tables there that were assigned for the chorus girls?

A. No special tables.

Q. How?

A. There was no special tables.

Q. You could take any table that was vacant; that was it, was it? A. Yes sir.

Q. And they did the same? A. Yes sir.

Q. So that if there were two sitting at one side of a table, why, any one else had the right to come and sit at the other side of that table; was that true?

MR. ROGERS: I object to that as argumentative and incompetent and irrelevant.

THE COURT: I think it is argumentative. The objection will be sustained.

Q. BY MR. PALMER: Was there anything to prevent—

THE COURT: Ask if there was any rule on the subject.

MR. ROGERS: The same objection.

Q. BY MR. PALMER: Was there any rule of

(Testimony of Sallie Margaret Claxton.) Alma Person.)
the house that provided that the women who came from the rear part of the house should not sit at the same table with the girls who were in the chorus?

MR. ROGERS: I object to that as incompetent, irrelevant and immaterial and she has said the chorus girls never sat with any of these other women that counsel has been speaking of.

THE COURT: Objection overruled. Answer the question.

MR. ROGERS: We except.

Q. We were not allowed to even talk to them, to the other women.

MR. PALMER: Just read the question.

(Question read)

A. Yes sir, that was the rule.

Q. That was the rule?

A. Yes sir.

MR. ROGERS: May I have the other answer? What was it? (Answer read as follows: "We were not allowed to even talk to them, to the other women.")

Q. BY MR. PALMER: You knew what the other women were doing there, did you?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial, and not within the issues, and no foundation laid.

THE COURT: What is the question?

(Question read)

THE COURT: The objection will be overruled.

MR. ROGERS: We except again.

A. Well, I knew in a way; I didn't know very much about it.

(Testimony of Sallie Margaret Claxton.) Alma Person. }

Q. BY MR. PALMER: That is, you never saw what they did?

A. No sir.

MR. ROGERS: That is objected to as argumentative, leading, suggestive, incompetent, irrelevant and immaterial.

THE COURT: Well, she has answered it. She said she didn't. I will overrule the objection.

MR. ROGERS: There is one little matter, while counsel is thinking about his question, that I would like to speak about. Your Honor has practiced in California, and you know in the state courts here we are, I believe, required to take exceptions. It annoys me, and I know it must annoy the Court and counsel, for me to be excepting. May I have a stipulation that following an adverse ruling I may have an exception entered, without specifically stating it, unless I have some special exception which I desire to take for some special reason, in order that I may not be continually annoying with the statement that we except, or something of that sort?

MR. PALMER: Yes, your Honor, I am perfectly willing to make such a stipulation as that.

THE COURT: All right.

MR. ROGERS: Very good. Then I will not speak again in the way of exceptions.

Q. BY MR. PALMER: Now, how many times have you been in Calexico?

A. Several times.

Q. And quite a while, and then go back?

A. Yes sir.

(~~Testimony of Sallie Margaret Claxton.~~) Alma Person.)

Q. When did you first quit?

A. I don't remember.

Q. How long after you had first gone down there?

A. A couple of months.

Q. Why did you quit?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial.

THE COURT: I think it is immaterial.

MR. PALMER: All right.

Q. Were you ever solicited there by any men that you were dancing or drinking with to have sexual relations with them? A. No sir.

Q. Never were talked to about that? A. No sir.

Q. Were you ever on the gambling floor there?

A. No sir.

Q. How much was the largest amount of money that you ever received for a day's work there, or your percentage?

MR. ROGERS: Objected to as irrelevant, incompetent and immaterial, and not within the issues.

THE COURT: I will overrule the objection.

A. I don't remember.

Q. BY MR. PALMER: What is the biggest one that you remember?

MR. ROGERS: The same objection.

THE COURT: Overruled.

A. I don't remember.

(P. 187 of Transcript) Q. By MR. PALMER: Before you went to Mexicali, had you practiced prostitution?

(Testimony of ~~Sallie Margaret Claxton.~~ Alma Person.)

A. No sir.

(P. 188 of Transcript) Q. BY MR. PALMER:
After you went to Mexicali, did you there in the Owl Cafe solicit any man or men to make a date with you? A. No sir.

CROSS EXAMINATION.

I have been a theatrical performer for six years, having experience up and down the coast at the Regal, Century theaters and cafes in Los Angeles. My specialty is dancing and singing. I met Mr. Fabian, one of the defendants, when he was in a stock company at the Regal Theater in Los Angeles, about six or seven months before I went to Calexico. Mr. and Mrs. Fabian were the first persons who spoke to me about going down to Mexico, and they told me if I wanted to go I could have a job. I went down to Calexico and stopped at the Hotel Virginia. I never received any male callers at my room at the Hotel Virginia. I never practiced any prostitution before I went down there, and have not practiced prostitution since I have been down there. My specialty at the Owl Cafe was to dance. I was never influenced by any person any way to dance with any particular man. The management never solicited me to have men drink. I was never instructed to associate with any man that I didn't want to.

(P. 194 of Transcript) Q. BY MR. ROGERS:
Now, at any time did any man go to your dressing room, or were any persons allowed to go into your

(Testimony of Sallie Margaret Claxton.) Alma Person.)
dressing room while you were at the old place, or the new place, as a matter of fact?

A. No sir.

Q. What were your instructions concerning meeting or seeing men or having men talk to you, or anything of that sort?

A. We were not allowed to talk or make an appointment, or go out on a machine ride, or nothing with nobody.

Q. Did anyone solicit you at any time to do any immoral or indiscreet act?

A. No sir.

Q. Now, with respect to the women who danced on that floor when you were there, you have said that you were not permitted to talk with or sit at the same table with any of the women who were supposed to be in the back part of the house; that is, in the rooms rented back there. Were other women besides those women on the dance floor sometimes? I mean by that, did the people come from the valley around there, slumming parties, and women who came apparently with their parties or husbands, or things of that sort, and dance?

A. Yes sir.

Q. Have you ever been to, we will say, Nat Goodwin's Cafe, or the Sunset Inn, or places of that sort?

A. Yes sir.

Q. State whether or not the women who came there accompanied by outsiders, that is, women who were not employed about the place, or women who were not

(Testimony of Sallie Margaret Claxton.) Alma Person.)
of the sort counsel has been talking about, whether they were permitted to dance.

MR. PALMER: Now, we object to that, if the court please. I will withdraw the objection. Go ahead.

THE COURT: Answer the question.

A. Well, excuse me, I didn't remember.

Q. BY MR. ROGERS: Well, Miss Person, what I am getting at is this: that was a public dance floor.

A. Yes sir.

Q. And women came in from various quarters that were not employed there, or connected with the place in any way, or didn't have any relation or association with it at all.

A. Yes sir.

Q. And danced?

A. Yes sir.

Q. What sort of—what proportion of the dancing crowd consisted of people of that sort, that is, people who came in from the outside?

A. A good many.

Q. Was there a restaurant connected with the place? A. Yes sir.

Q. Did you live there at the restaurant? I mean, did you take your meals there?

A. Yes sir.

(P. 197 of Transcript) Q. Yes. Well, now, did other persons, that is, the parties that came from the valley, came from El Centro, Mexicali, Calexico, even Los Angeles, places like that, did they come there and

(Testimony of Sallie Margaret Claxton.) Alma Person.)
have dinner and then dance during their taking of the meals?

A. Yes sir.

(P. 199 of Transcript) Q. During any of your employment down there, we will say at the old place—I will pick that out—did you in any wise associate with or talk with, eat at the same table with, or drink at the same table with any prostitute?

A. No sir.

Q. Did any of these women whom counsel is calling prostitutes,—were any of these women speaking to you, did they speak to you or talk to you in any way?

A. No sir.

THE COURT: Gentlemen, I have in mind certain questions I would like to ask this witness.

MR. ROGERS: I would be more than glad that your Honor should.

THE COURT: If I ask anything either of you think should not be asked, you are at perfect liberty to object to it, and I will consider your objection.

MR. ROGERS: Very good sir.

Q. BY THE COURT: You knew there were women there who were prostitutes, did you, at the time?

A. I didn't know they were prostitutes.

MR. ROGERS: I object to calling for the conclusion or opinion of the witness if your Honor please. Her idea that they were prostitutes, I have no objection to your Honor inquiring for, but to characterize them as her knowing them to be such, I must ask your Honor—

(Testimony of Sallie Margaret Claxton.) Alma Person.)

Q. BY THE COURT: Were there women there that were reputed to be prostitutes?

(P. 200 of Transcript) A. I didn't know.

Q. You didn't know?

A. No sir.

Q. There were women there that you were asked not to associate with?

A. Yes sir.

Q. Why were you directed not to associate with them?

A. I was never told.

Q. Never told why?

A. No sir.

Q. You knew these women roomed back of the cafe there, in back of the stage?

A. I didn't know where they roomed. I saw them go back there, but I didn't know if they lived there or not.

Q. You saw them go back there with men?

A. Sometimes.

Q. And you had an idea of the purpose for which they were going?

A. No sir.

Q. You did not. Now, did you feel ashamed by being brought in contact, as you were, with those women?

MR. ROGERS: I object to that, if your Honor please, "being brought in contact as you were," upon the ground that the witness has said she never spoke to any of them; she never sat with any of them, or ate with any of them, or drank with any of them.

(Testimony of Sallie Margaret Claxton.) Alma Person.)

(P. 201 of Transcript) Q. BY THE COURT:
Taking that into consideration now, I ask you if you
were shocked?

A. No sir.

Q. Had you previously been familiar with such
sights anywhere else?

A. No sir.

Q. Or that kind of women?

A. No sir.

Q. You say you did not know what these women
were doing?

A. No sir.

Q. How old are you?

A. 17.

THE COURT: I believe that is all I desire to ask.

Q. By Mr. Rogers: Miss Person, do you remember saying to Mr. Malone once, while you were there, Mr. Malone being present and certain other persons sitting around, that if you had a daughter or a sister and you wanted her to stay straight, although she had to be a working girl and *own* her own living, that you would not want her to have any better treatment and education than she would get in the Owl Cafe?

MR. PALMER: We object to that as incompetent, irrelevant and immaterial.

THE COURT: Well, that is the same line as the question that was put yesterday, the influence that that surrounding had upon these particular witnesses. To what proposition does this go in the way of impeachment, if any?

(Testimony of Sallie Margaret Claxton.) Alma Person.]

(Page 202 of Transcript) MR. ROGERS: It is not by way of impeachment, and is not a contradiction or impeachment of anyone.

MR. PALMER: It is not cross-examination either, if your Honor please.

MR. ROGERS: But it is as a matter of fact a vital element of the case, the views these young women took of their treatment there, and whether they were taken there for the purpose of debauchery.

THE COURT: I am going to overrule the objection.

MR. PALMER: All right, your Honor.

MR. ROGERS: Will you please read the question. (Question read).

A. Yes sir, I did say that.

Q. And was that true?

A. Yes sir.

MR. PALMER: Well—

THE COURT: I think, Mr. Palmer, that we might as well get the opinion of these girls of the influence by that sight. You know the history of the life of these girls. I will allow that question, and allow you to recall that other witness and ask her.

MR. ROGERS: Yes sir.

THE COURT: If the scenes there in any way excited her passions.

(P. 203 of Transcript) Q. BY MR. ROGERS: Now, during your career, you say you began theatrical work when you were six years old.

A. Yes sir.

(Testimony of Sallie Margaret Claxton.) Alma Person.)

Q. And were on the stage from that time on. During that time were you employed through various agencies, that is theatrical agencies, to go to various cafes and entertainment places?

A. Yes sir.

Q. After you had been at the Owl Cafe the first time, did you return?

A. Yes sir.

Q. And how many times have you been employed there?

A. About four times.

Q. And during all the times that you have been employed there, have you been permitted at any time to associate with any men or meet any men or go anywhere with any men, have them come to your rooms, make dates with them, as you call it, appointments with them, or anything of that sort?

A. No sir.

(P. 211 of Transcript) Q. And then you would go and sit at the tables. During the time you were dancing there, there were no policemen dancing with you?

A. No policemen?

Q. Yes, at the time you were dancing with the men there was not any policemen right there going around in the waltz with you?

A. No sir.

Q. And at the time you sat at the table, no policeman sat at the table with you, when you were sitting there drinking with those men?

(Testimony of Sallie Margaret Claxton.) *Alma Person.*

A. No sir.

Q. And when you went across the border, back home, there was not any policemen following you; you didn't have any outriders, any police outriders or anything?

A. Well, they watched us.

MR. PALMER: They just watched you. That is all.

Recross-Examination

BY MR. ROGERS:

Q. Now about the policemen. While the policemen did not dance with you while you were dancing with someone else, or sit at the table, there was always an officer right there present, circulating around among the tables, was there not?

A. Yes sir.

Q. And not only an American officer,—this Dan somebody or other,—but with Mexican officers as well, in uniform?

A. Yes sir.

Q. Always on the floor?

A. Yes sir.

Q. And when you went home at night these officers always—while they did not accompany you, they always watched you home?

A. Yes sir.

Q. BY MR. PALMER: How many policemen did they keep there on the floor of that place all the time?

A. What do you mean, just in the dance hall?

Q. I mean in the dance hall, and the gambling room, and around in other places.

A. About from 7 to 10.

(Testimony of Sallie Margaret Claxton.) Alma Person.)

(P. 213 of Transcript) Q. 7 to 10 there all the time?

A. All the time.

Q. From the time you went to work until you quit?

A. Yes sir.

TESTIMONY OF GRACE COVERT, FOR THE GOVERNMENT.

GRACE COVERT, called on behalf of the Prosecution being first duly sworn, testified as follows:

My stage name is Grace Claire. I was eighteen years old on last November. I met Mr. and Mrs. Fabian about a year ago. I worked at other places as a show-girl. I had a conversation with Mr. and Mrs. Fabian about coming to Callexico.

(P. 216 of Transcript) Q. Now, did you have any conversation with them, or either of them in regard to going to Callexico?

A. Yes sir.

MR. ROGERS: That is objected to as irrelevant, incompetent and immaterial, particularly the part relating to Mrs. Fabian, she not being one of the parties defendant or charged here, and there having been no foundation for evidence laid as respects any conspiracy, so-called, or agreement, so as to bind any other defendants concerning their testimony, and particularly the statements of Mrs. Fabian; and no foundation has been laid.

THE COURT: The objection will be overruled. He didn't ask what the conversation was. She has answered.

(Testimony of Grace Covert.)

MR. PALMER: I didn't hear the answer.

THE COURT: She said, yes sir.

Q. BY MR. PALMER: Was that conversation had by you with both of them together?

A. No, sir.

(P. 217 of Transcript) Q. Did you have a conversation with both of them together about that?

A. I did, yes sir.

Q. State what was said in that conversation.

A. Why—

MR. ROGERS: I object to her stating—if I may be permitted the same objection I made a moment ago to the other question without repetition, unless counsel request it.

THE COURT: Well, it is not necessary to repeat it. The conversation had in the presence of Fabian, of course, is material, regardless of who had it. The objection will be overruled.

A. Why, I don't know. They mentioned the salary and what we had to do. That was all.

Q. BY MR. PALMER: Now, what did they—a salary for what?

A. Working in the chorus.

Q. Where?

A. At Calexico, the Owl Cafe—or Mexicali.

Q. And what was said about their wanting you to go down there, if there was anything said?

A. Why, they wanted me to work in the chorus, and that was all. They told me there were prostitutes down there and—

(Testimony of Grace Covert.)

Q. They wanted you to work in the chorus at the Owl Cafe at Mexicali?

A. Yes sir.

(P. 218 of Transcript) Q. BY THE COURT: You were about to make a statement, and you were interrupted. You said there were prostitutes there, and something. What did you want to say?

A. They told me that there were prostitutes there, that I was to have nothing to do with them, whatever.

Q. BY MR. PALMER: What did they tell you you were to receive?

A. \$30 ~~to~~ first two weeks, and \$25 the following weeks.

Q. And what, if anything, was said to you about transportation down there?

MR. ROGERS: May my objection follow this?

THE COURT: Yes sir.

MR. PALMER: Read the question.

(Last question read by the reporter.).

A. Why, transportation was paid—would be paid.

Q. They were to pay the transportation?

A. Yes.

Q. Who was with you at that time?

A. Grace Fay.

Q. Do you know where she is now?

A. No sir.

Q. Now, did you accept that offer at that time?

MR. ROGERS: Objected to as calling for a conclusion and opinion, and incompetent.

(Testimony of Grace Covert.)

Q. BY MR. PALMER: Did you go down there from Los Angeles in answer to that talk?

(P. 219 of Transcript) A. Why, I decided to go, but I changed my mind; I didn't go right away.

Q. Where did you then go?

A. Bisbee, Arizona.

Q. What did you do there?

A. Grace Fay and I went with the Raymond Teel show.

Q. Went to Bisbee; afterwards did you communicate with the Fabians about going to Calexico?

A. Yes sir.

Q. How?

A. Wrote Mrs. Fabian a letter.

Q. And what in that letter did you—Have you a copy of that letter?

A. No sir.

Q. What in that letter did you say to her about going to Calexico or Mexicali?

MR. ROGERS: Objected to on the ground it is incompetent, no foundation has been laid; it is irrelevant and immaterial.

THE COURT: That is a letter to Mrs. Fabian?

MR. PALMER: Yes sir.

MR. ROGERS: To Mrs. Fabian.

(P. 220 of Transcript) MR. PALMER: Who has been, by the objection of counsel, prevented from being examined.

MR. ROGERS: I take exception to that statement of counsel in these circumstances and characterize it as

(Testimony of Grace Covert.)

legal misconduct. I don't speak of it as personal misconduct, you understand, but I take exception as legal misconduct.

THE COURT: I will sustain an objection to it at this time.

Q. BY MR. PALMER: Did you receive any communication from Mrs. Fabian in answer to your letter?

MR. ROGERS: Objected to as immaterial, incompetent and irrelevant, on the ground that Mrs. Fabian is not shown to be a party to the conspiracy.

THE COURT: I will overrule the objection.

MR. PALMER: Read the question.

(Last question read by the reporter).

A. Yes; I got a telegram.

(P. 222 of Transcript) Q. Now, did you at the railroad station inquire for tickets for yourself and Grace Fay to go from Bisbee, Arizona, to Calexico, California?

A. Yes.

MR. ROGERS: I have to object to that as leading and suggestive, in addition to the other objection.

(P. 223 of Transcript) THE COURT: It is leading, but not of primary importance. I will overrule the objection.

Q. BY MR. PALMER: Did you answer?

A. Yes sir.

Q. Were the tickets there? Were you furnished with the tickets by the railroad agent?

A. Yes sir.

Q. You and Miss Fay both?

(Testimony of Grace Covert.)

THE COURT: Answer yes or no.

A. Yes sir.

Q. BY MR. PALMER: And did you travel upon those tickets so furnished to you?

A. Yes sir.

Q. Where did you go to on those tickets? Where did you go?

A. To Calexico.

Q. To Calexico?

A. Yes sir.

Q. BY THE COURT: Did you pay for them?

A. No sir. We paid \$2.50 for something; I don't know what it was.

(P. 226 of Transcript) Q. Did you sign a contract with the company?

A. Yes sir

Q. Have you a copy of the contract?

A. Yes sir.

Q. Have you it with you?

(P. 227 of Transcript) A. Yes sir.

A. Will you let me see it?

(Witness handing paper to Mr. Palmer).

Q. Who made out the contract for you to sign?

A. I don't remember.

Q. Can you tell by looking at the paper itself?

MR. ROGERS: Well, unless she saw it, Mrs. Covert saw it written—

THE WITNESS: No; I don't remember who made it out.

(Testimony of Grace Covert.)

Q. BY MR. PALMER: Did you see it written out?

A. Yes, I did, but I don't remember who it was.

Q. Well, where was it made out?

A. Really, I don't know.

Q. Was it at the Owl Cafe?

A. I couldn't say.

Q. At the Virginia Hotel?

A. I really don't remember.

Q. This is the contract that you worked there under, is it?

A. Yes sir.

MR. ROGERS: Well, that is calling for a conclusion and opinion, and incompetent. The circumstances of her signing it may possibly be competent, but that is certainly a conclusion.

MR. PALMER: We offer the contract in evidence.

MR. ROGERS: Objected to as no foundation laid, irrelevant, incompetent and immaterial.

(P. 228 of Transcript) THE COURT: Let me see it. (Receiving paper from Mr. Palmer). I am inclined to think, Mr. Palmer, you should prove the execution of the contract by the other party, or have some evidence on the subject.

Q. BY MR. PALMER: Did you see the contract written?

A. I don't remember.

Q. You don't remember? Is that your signature there? (exhibiting paper to witness).

A. Yes sir.

(Testimony of Grace Covert.)

Q. Do you know Dan Malone?

A. Yes sir.

Q. Don't you know that Dan Malone wrote that contract?

A. No.

Q. Did you see him sign his name to it there?

A. I don't remember.

Q. You don't remember? Your Honor, we offer this in evidence.

MR. ROGERS: Objected to, no foundation laid, incompetent, irrelevant and immaterial.

THE COURT: Is that the contract, you say, under which you worked?

A. Yes sir.

THE COURT: I will overrule the objection.

THE CLERK: Government's Exhibit No. 3.

THE COURT: What exhibit is it marked?

(P. 229 of Transcript) THE CLERK: No. 3, your Honor; Government's Exhibit 3.

MR. PALMER: (Reading)"

"Mexicali, B. C., Mexico, March 28, 1916.

"Contract between Grace Clair and the Owl Cafe.

"I, Grace Claire, this day and date, March 28th 1916, at Mexicali, Mexico, enter into the following described contract:

"Indefinite engagement at \$30.00 per week for a period of 2 weeks, and \$25.00 for the following indefinite weeks, to appear in chorus act commencing March 28, 1916; to appear not to exceed six acts each evening. Working hours 7:30 p. m. to 3 a. m.

(Testimony of Grace Covert.)

"Privilege retained by the Owl Cafe for an extended engagement.

"Disorderly conduct or prostitution shall be cause for immediate dismissal and cancellation of this contract.

"Percentage on drinks for women 40 per cent, except Schiltz beer, which shall be 50 per cent.

"All performers to be governed by house rules.

"Witness our hands and seal this 28th day of March, 1916, at Mexicali, B. Cfa, Mexico.

"The Owl Cafe, By D. Malone.

"Grace Claire."

(P. 230 of Transcript) Q. And then after you danced with men, what was done then?

A. Why, we would sit down and have drinks.

Q. And was there any understanding as to whether a man that you danced with—was it a rule of the house men you danced with should buy drinks?

MR. ROGERS: Objected to as irrelevant and incompetent, no foundation laid. I don't know what he means by "a rule of the house."

(P. 231 of Transcript) THE COURT: Well, I will sustain an objection on the ground that the rule may not—Were there any instructions about that?

MR. PALMER: Well, I presume, your Honor, of course, that there were no instructions about it, and I don't want to ask that question. It would waste time.

Q. You had no instructions that the men that

(Testimony of Grace Covert.)

danced with you should buy drinks? You didn't have any instructions like that?

A. Why, we didn't have to even dance with them if we didn't want to.

Q. Yes. But you didn't have any instructions that a man couldn't dance without buying drinks?

A. I don't know if they had, but they could if they wanted to.

Q. But what I mean is, you had no instructions on the subject by the managers of the Owl Cafe? Did you have any instructions on that subject as to whether a man should buy you drinks after he danced with you?

A. I don't remember.

(P. 232 of Transcript) Q. BY MR. PALMER: Did you have any instructions from any of the management about not associating with any women about that cafe?

A. Yes sir.

CROSS-EXAMINATION.

Mrs. Covert testified on cross-examination that she was working for the Raymond Teel Burlesque Company of Lowell, Arizona, as a chorus girl before she went to work for the Owl Cafe. That she wrote to Mrs. Fabian at Calxico to get her a job.

(P. 236 of Transcript) Q. Is this the letter, Mrs. Covert? I will show you an envelope first. Is that your writing? (Handing paper to the witness)

A. Yes sir.

(Testimony of Grace Covert.)

Q. And the letter? (Handing paper to the witness)

A. There are two pages there. Suppose you read both pages.

Q. BY THE COURT: Don't you recognize the letter without taking the time to read it all?

A. Yes.

MR. ROGERS: It is pretty dark here.

THE COURT: She says, yes.

Q. BY MR. ROGERS: So then we are to understand, Mrs. Covert, that being with this company and not getting your wages, you thought you would rather go down to Calxico, and so you wrote this letter; that is about the size of it?

(P. 237 of Transcript) A. Yes sir.

MR. ROGERS: We offer this in evidence. (Handing letter to Mr. Palmer). While you are reading it, I will go along a little bit.

Q. Were you married at that time, Mrs. Covert?

A. Yes sir.

Q. BY THE COURT: What is the answer?

(Last question read by the reporter).

THE COURT: All right, proceed.

Q. BY MR. ROGERS: And pardon me, how long before going with the Raymond Teel Company had you been married?

A. Why, married November the 29th, and I don't remember exactly what the day of the week was.

Q. BY MR. PALMER: What year?

Q. BY MR. ROGERS: November 29th of 1915?

(Testimony of Grace Covert.)

A. Yes sir.

Q. This letter from Bisbee appears to be March 22, 1916. So you would be married—

A. Yes, the November before that.

Q. The November before that?

A. Yes sir.

Q. Your husband with you?

A. No sir.

(P. 238 of Transcript) Q. Was not with you at the time that you went to Bisbee?

A. No sir.

Q. Was he with you at Calexico at any time?

A. No sir.

MR. PALMER: I haven't any objection to it.

MR. ROGERS: The envelope and the letter I offer as Defendants' Exhibit.

THE CLERK: Exhibit B.

MR. ROGERS: B1 and 2?

THE CLERK: No, all one exhibit, I presume, unless you want them separate.

(P. 239 of Transcript) MR. ROGERS: No, I don't think so. The envelope (reading) "Bisbee, March 22, 8:30 p, 1916. Mrs. Grace Fabian, Calexico, General Delivery." Upon the back of it, "Return to Grace Claire, Bisbee, Arizona." The post mark "Bisbee, Arizona," and on the back, "Calexico, Cal., March 24, 1916." And the letter, "Bisbee, Arizona, March 22nd, 1916." "Dear Mrs. Fabian: I and Grace Fay are in Bisbee, which I don't think is far from Calexico, and would like very much to join you if you

(Testimony of Grace Covert.)

have any vacancies and still care to have us at \$30 a week.

"I was out the day you called. My sister-in-law answered the phone. She said you would call again, but you didn't. I called your place but could get no answer. The following day we were offered a position with the Raymond Teel Comedy Company to go to Bisbee and from there to Calexico, and other parts of Arizona, and we thought by going we might be able to get in touch with you. We got notice yesterday we were not going to Calexico, but to Globe instead, and then to Honolulu, so if you care to have us and will send us the fare or tickets to Calexico, we will come immediately and not come right back but to stay until you leave.

"I am very sorry I was out when you called, as I was very anxious to go with you and liked your people very much.

"Miss Fay is also here with me and is now of age and very anxious to come. We can start within a moment's notice if you decide on having us.

(P. 240 of Transcript)

"Please answer immediately, as if we don't hear from you by Saturday we must leave with this company for Globe, going Saturday night.

"Sincerely,

"Grace Claire and Grace Fay."

(P. 244 of Transcript) Q. Now, at any time were you told what you were to do if any man made improper proposals to you or propositions to you? I

(Testimony of Grace Covert.)

will change that a bit. Were there officers about through the place there, policemen, guards and one thing and another?

A. Yes sir.

Q. Now you may state whether or not you were directed by the management what to do in case any man said anything to you of an improper nature.

A. Just let him know.

Q. Let the officer know?

A. Yes sir.

Q. Did any man make any proposals to you of an improper nature while you were there?

A. No sir.

Q. Now with respect to these women that you were told were there, who were prostitutes: At any time did you hold any conversation with any of them?

A. No sir.

Q. Did you at any time sit down at a table with any of them?

A. No sir.

(P. 245 of Transcript) Q. Or did any of them approach you in any way?

A. No sir.

Q. Now Mrs. Covert, since you returned from Calexico—you will pardon me for asking you—have you led any immoral life whatever?

A. None whatever.

Q. Did anything happen at Calexico that did in any wise induce you to view with approval an immoral life—

(Testimony of Grace Covert.)

MR. PALMER: Now we object to that.

MR. ROGERS: (Continuing)—or to do immoral acts?

MR. PALMER: We object to that if the court please as being incompetent, irrelevant and immaterial and not cross-examination.

MR. ROGERS: I mean Mexicali; I want to modify my question.

MR. PALMER: Sure. It is not cross-examination, and calling for a conclusion of the witness.

THE COURT: There has a question been in my mind all the time as to whether it was cross-examination, I thought it was part of the defense.

MR. ROGERS: In that behalf, sir, might I suggest if it is a part of the defense, nevertheless it becomes a part of the defense by reason of the testimony given on direct; it becomes a part of the defense by virtue of the things which Mrs. Covert, Mrs.—

THE COURT: I will overrule the objection. Proceed.

(P. 246 of Transcript) MR. ROGERS: Do you understand the question, Mrs. Covert? I will re-put it to you. Did anything you saw—

MR. PALMER: No, if the court please, we ask that the Reporter read the question, so I won't need to make the objection again.

MR. ROGERS: Very good.

THE COURT: Read it.

MR. ROGERS: Mexicali instead of Calexico.

(Question read as follows: "Did anything hap-

(Testimony of Grace Covert.)

pen at Mexicali that did in anywise induce you to view with approval an immoral life or to do immoral acts?").

A. No sir.

Q. Since you have returned from Calexico, what business have you been following, what have you been doing?

A. Working in cafes, chorus work.

(P. 248 of Transcript) Q. And Mr. Fabian, and Mr. Malone and Mr. Beycr?

A. Yes sir.

Q. Where did you get acquainted with them?—Well, besides Mr. Fabian, you have already testified to meeting him on Main street in Los Angeles.

A. I met them at Calexico.

Q. Met all of them at Calexico?

A. Yes sir.

Q. Were they doing—Have you seen them at the Owl Cafe?

A. Yes sir.

Q. What were they doing there?

A. Why, Mr. Malone was mostly watching the girls, is all I know.

Q. Do you know whether he was—what official title he had there?

A. Beg pardon?

(P. 249 of Transcript) Q. Did he ever tell you what his position was there?

A. I think not.

Q. Did he say anything to you about being the

(Testimony of Grace Covert.)

manager?

A. Oh, yes; I knew he was the manager.

Q. The manager of the Owl Cafe?

A. Yes sir.

Q. And what position did Warren Fabian occupy?

A. Why, he was the chorus director and he led numbers.

Q. And what position did Chartran occupy; what was he doing there?

(No answer).

Q. BY THE COURT: What did he do there?

A. I don't know.

Q. BY MR. PALMER: What did Beyer do there?

A. Mr. who?

Q. What was his position, Mr. Beyer?

A. I don't know who he is.

Q. Do you know F. B. Beyer, or Beyers?

A. No, I think not.

Q. Do you know these four men sitting here, all of them (indicating the defendants)?

A. I know three of them.

Q. You know three of them.

A. I know the other one to speak to, but that is all.

Q. Where did you get acquainted with him enough to know him to speak to him?

(P. 250 of Transcript) A. At the Owl Cafe.

Q. Did you learn what position he occupied there?

A. No sir.

TESTIMONY OF BARNEY MORRIS, FOR THE GOVERNMENT.

Barney Morris, called as a witness on behalf of the Prosecution, being first duly sworn, testified as follows:

My name is Barney Morris. I reside in Los Angeles, having a jewelry business called The Security Loan and Jewelry Company. I am acquainted with Mr. Beyer and all the other defendants. Some time in March, 1916, Mr. Malone gave me three envelopes; upon each envelope was written a name, and requested me to deliver the envelopes when the parties called for the envelopes. I do not remember the name of any particular one. The women whose names were on the envelopes subsequently came and got the envelopes. I am not, and have not been, in the employ of F. B. Beyer. I know Mr. Beyer. I have known him for about two years. I know a firm by the name of Allen, Withington, Beyer, but have never been in their employ. They have a cafe and gambling place at Mexicali. I have seen Mr. Beyer write his name.

(P. 263 of Transcript) Q. Have you seen Mr. Beyer write?

A. Have I seen him what?

Q. Write, write his name.

A. Yes, sir.

Q. You know his name when you see it written?

A. Absolutely, yes sir.

THE COURT: F. B. Beyer?

A. F. B. Beyer, yes sir.

Q. BY MR. PALMER: I will ask you to look at this paper, Mr. Morris (showing paper to witness)—

(Testimony of Barney Morris.)

MR. ROGERS: Don't answer any questions, please, until I have an opportunity to object.

THE COURT: Have the paper marked for identification.

THE CLERK: Government's Exhibit 4 for Identification.

Q. BY MR. PALMER: Now, I will ask you, sir, whether or not the name that you have just seen there, F. B. Beyer, on this Exhibit 4 for Identification, is the signature of F. B. Beyer?

MR. ROGERS: Objected to as no foundation laid, incompetent, irrelevant and immaterial. The foundation as an expert is not laid, and the matter itself is immaterial.

(P. 264 of Transcript) THE COURT: Objection overruled.

MR. PALMER: Read the question.

(Question read.).

A. The signature is rather crowded there, although it looks like the signature.

Q. It looks like the signature of Mr. Beyer, as you know it?

A. Yes, it does.

MR. ROGERS: The same objection.

Q. BY MR. PALMER: Would you say it is his signature?

A. I would not swear to it; it looks like his signature.

MR. ROGERS: I wanted you not to answer until I had a chance to object.

A. I beg your pardon.

(Testimony of Barney Morris.)

MR. ROGERS: I am objecting as incompetent, irrelevant and immaterial, and no foundation laid. If my objection may follow this all the way through I won't continue to repeat it.

THE COURT: The objection may follow it. Objection overruled.

MR. PALMER: Now, your Honor, we offer in evidence the paper that has just been marked as United States Exhibit 4.

MR. ROGERS: It is objected to; no foundation laid, not properly identified, incompetent, irrelevant and immaterial.

THE COURT: Let's see it.

(P. 265 of Transcript) (The paper was handed to the court).

Q. BY THE COURT: What did you say your name was?

A. Barney Morris.

Q. How many times have you seen the signature of F. B. Beyer?

A. Oh, a number of times.

Q. Have you had correspondence with him?

A. Yes, I have had a few letters.

Q. Now, in your opinion, is this his signature, or is it not?

A. It looks like his signature.

Q. Well, what is your opinion about it?

A. My opinion is that it is his signature.

THE COURT: The objection will be overruled.

MR. PALMER: (Reading)

(Testimony of Barney Morris.)

“PLAINTIFF’S EXHIBIT 4.

“THEATRICAL CONTRACT. Mexicali, B. C. Mexico, 3/19/16.

“Contract between Lela Cavell and the Owl Cafe.

“I, Lela Cavell, this day and date, March 19, at Mexicali, Mex., enter into the following described contract:

Two weeks engagement at \$30 per week, for a period of two weeks, and \$25 for the following weeks, to appear in chorus act, commencing 3/19/16, to appear not to exceed six acts each evening. Working hours 7:30 P. M. to 3 A. M. Privilege retained by the Owl Cafe for an extended engagement. Disorderly conduct or prostitution shall be cause for immediate dismissal and cancellation of this contract. Percentage on drinks for women, 40 per cent, except Schiltz beer, which shall be 50 per cent. All performers to be governed by house rules.

(P. 266 of Transcript)

“Witness our hands and seal this 19th day of March, 1916, at Mexicali, B. Cfa, Mexico The Owl Cafe by F. B. Beyer, Lela Cavell.”

CROSS-EXAMINATION

(P. 267 of Transcript) BY MR. ROGERS:

Q. You spoke about knowing Mr. Beyer’s signature and having seen him—Do you know it from having seen him sign it himself in your presence? Have you ever seen him write it yourself in your presence?

A. Yes, I have.

(Testimony of Barney Morris.)

Q. How many times?

A. I don't just remember; a few times.

Q. A few times?

A. Yes, probably two or three or four times.

Q. Would you say that the body of this contract, where the words appear in it, was in his handwriting?

A. I don't say it was his signature. I said it looked like his signature.

Q. Well, Mr. Morris, would you say that the body of the contract, the words inserted in the blanks—

A. Oh, that I wouldn't know.

Q. You wouldn't know?

A. No.

Q. Well, if you have seen him write, haven't you as much opinion about that as you have about the signature?

A. No, I have not. The signature to me is easier to remember than the handwriting.

Q. Have you any correspondence of his in your possession?

A. I don't know whether I have or not.

(P. 268 of Transcript) Q. How many times have you seen him write his signature?

A. I don't know exactly, Mr. Rogers.

Q. Three or four or five or six or ten or what?

A. Oh, probably three or four.

Q. Three or four?

A. Yes; maybe more, maybe less.

(P. 269 of Transcript) Q. And never having seen him sign his name in pencil, and never having

(Testimony of Barney Morris.)

seen his signature written in pencil, would you say that this is his signature?

A. No; I didn't say that that was his signature.

Q. And don't say now?

A. No, I don't.

TESTIMONY OF DAISY SMITH, FOR THE GOVERNMENT.

Daisy Smith, called as a witness on behalf of the Prosecution, being first duly sworn, testified as follows:

My profession is the show business. I worked at the Regal Theater in Los Angeles and other places. I am not acquainted with F. B. Beyer. I have never had any conversation with Mr. Beyer. There was never anything said to me about going to Calexico or Mexicali, neither was there anything said to me about going to work in the Owl Cafe. I never had any talk with Warren Fabian about going to Calexico or Mexicali. I did have a talk with defendant Chartran about a telegram. That conversation was in the back of the Regal Theater. I do not remember when I got it and Chartran said that I heard that you are going to Calexico and I answered saying that I do not know where they get the idea. I had received a telegram, I cannot say from whom, but at that conversation Mr. Chartran took the telegram away from me and just said, "What do you want with it."

CROSS-EXAMINATION.

I never was a performer at the Owl Cafe or never went to Mexicali. I do not know anything about the Owl Theater.

TESTIMONY OF DICK PARKES, FOR THE GOVERNMENT.

Dick Parkes, called as a witness on behalf of the Prosecution, being first duly sworn, testified as follows:

I am in the theatrical booking exchange business. I had no conversation with any of the defendants.

TESTIMONY OF HENRY W. DELO, FOR THE GOVERNMENT.

Henry W. Delo, called as a witness on behalf of the Prosecution, being first duly sworn, testified as follows:

I am a special officer for the Republic Theater. I know Mr. and Mrs. Fabian. I heard a conversation between Warren Fabian, Mrs. Fabian, *Allen* Person in regard to going to Mexicali.

(P. 283 of Transcript) Q. Did you hear any conversation between Warren Fabian and Mrs. Fabian and Alma Person and Anna Gregory in regard to going to Mexicali?

MR. ROGERS: That is objected to as irrelevant, incompetent and immaterial, and I call particular attention to the fact that both Mrs. Fabian and Anna Gregory have been shown to be married to the defendants, and therefore, conversations between them cannot be related.

THE COURT: The objection will be overruled. What is your answer?

A. What is the question?

(Last question read by the reporter.)

A. Only that they were going there to work.

(Testimony of Henry W. Delo.)

Q. BY MR. PALMER: Did you hear any arrangement made between Fabian and these girls, or either of them, or any talk about their contract?

MR. ROGERS: Objected to as calling for a conclusion or opinion, and incompetent, irrelevant and immaterial.

MR. PALMER: The first few words of that are objectionable, and I will reframe the question.

THE COURT: Well, re-frame the question then.

Q. BY MR. PALMER: Did you hear any conversation between Fabian and these girls, or either of them, in regard to the contract that would be made, or the terms upon which they should go to Calexico?

A. No, I didn't.

Q. You did not. That is all.

TESTIMONY OF C. F. WILLARD, FOR THE GOVERNMENT.

C. F. Willard, called as a witness on behalf of the Prosecution, being first duly sworn, testified as follows:

I was working for the Southern Pacific Railway on March 25, 1916. I sold Mrs. Warren Fabian tickets to be telegraphed to Bisbee, etc.

(P. 285 of Transcript) Q. Mr. Willard, I will ask you to state whether or not you sold to Mrs. Warren Fabian two tickets to be telegraphed to Bisbee, Arizona, to be used from Bisbee, Arizona, to Calexico, California, by Grace Claire and Grace Fay?

MR. ROGERS: Objected to as irrelevant, incompetent and immaterial, no foundation laid, and not within the issues.

(Testimony of C. F. Willard.)

THE COURT: The objection will be overruled.

A. Yes sir, I did.

Q. BY MR. PALMER: When?

A. March 25th, 1916.

MR. ROGERS: May my objection follow this whole line?

MR. PALMER: Oh, yes.

Q. If you know whether or not the tickets were actually telegraphed to Bisbee, Arizona, you may state.

MR. ROGERS: Objected to as irrelevant, incompetent and immaterial, calling for a conclusion or opinion, no foundation laid, and not the best evidence.

THE COURT: The objection is overruled.

A. Yes sir; they were.

Q. BY MR. PALMER: Did you telegraph the tickets yourself?

A. I did. Well, I will—I didn't telegraph them direct to Bisbee, but I knew they were telegraphed, because if they would not have, they would have been marked on here. I telegraphed the General Passenger Office authorizing the tickets to be delivered, and my records show they were delivered—

(P. 286 of Transcript) MR. ROGERS: Well, now, I will object to that as not the best evidence, a conclusion or opinion, and move to strike out the answer as to what his records show.

THE COURT: The answer will be stricken out.

MR. PALMER: That is, as to the part about what his records show?

(Testimony of C. F. Willard.)

THE COURT: Yes, and about telegraphing.

Q. BY MR. PALMER: Have you ever been in the Owl Cafe—the old Owl Cafe in Mexicali?

A. Yes sir.

Q. Have you ever seen there members of the chorus or did you know the members of the chorus—some of them?

A. I have seen them there, yes sir.

MR. ROGERS: I think the times is not stated, if your Honor pleases. I call your Honor's attention to that, that the time was not stated; it may not be within the issues.

THE COURT: All right. I understand that, Mr. Rogers. The objection will be overruled.

Q. BY MR. PALMER: I will ask you if you have ever seen any members of that chorus in the old Owl Cafe in the part of the cafe that was used for the purpose of gambling?

CROSS-EXAMINATION.

I worked for the Southern Pacific in February and March, 1916, and worked for them at that time for about six weeks to two months. I sold the ticket to Mrs. Fabian the same day that I made it out. I made a record of the sale of the ticket.

(P. 293 of Transcript) Q. Where is it?

A. Well, there is probably a dozen or fifteen records. They should be in the office at Calexico.

Q. And the ticket itself, where should that be?

A. Let's see—it should be in the possession of the general passenger department of the E. P. & S. W.

(Testimony of C. F. Willard.)

That would be my impression; I am not in position to know that, but that is my impression, it should be.

Q. It would be in the possession of the Southern Pacific Company, would it not, the auditor's department of the Southern Pacific, don't you know that, a Southern Pacific ticket?

(P. 294 of Transcript) A. I know, but it was turned over to the E. P. & S. W. for authority for issuing a ticket.

TESTIMONY OF DAVE GERSHON, FOR THE GOVERNMENT.

Dave Gershon, called as a witness on behalf of the Prosecution, being first duly sworn, testified as follows:

I have made diligent efforts to find Lela Caville for the purpose of this trial, also Vivian De Lamar and Daisy North, but have been unable to locate them.

STIPULATION.

(P. 300 of Transcript) Stipulated by counsel for Government and defendant that under the laws of Mexico, prostitution is licensed and the gambling games are licensed and that the sale of intoxicating liquors is licensed, and that the Owl Cafe was a licensed place under the laws of Mexico.

Whereupon Government rests.

TESTIMONY OF FRANCISCO BORQUES, FOR THE DEFENDANTS.

Francisco Borques, called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

That he is the Presidente of Mexicali, the district in which the Owl Cafe operates. That the Owl Cafe is licensed to sell liquors and permits games of chance to be played in its theater. That in January, February and March, 1916, the Owl Theater conducted a chorus in connection with its theater and that the girls who performed in the chorus were not permitted to practice prostitution. That at all times the girls were under surveillance by officers of the Mexican government under his supervision and that said supervision consists of having officers in the theater where the girls performed. That he never observed any disorder in connection with the conduct of these women and that the reason that he knew that these women did not practice prostitution is that any woman that practices or indulges in prostitution in that district is required to register and take out a license before they can do so. That said licensed women are required to pay a fee weekly to the government for practicing prostitution; that the girls whose names are mentioned in the indictment, and also other girls who performed in the chorus at the Owl Theater, had not taken out any license, nor had they registered to practice prostitution; that he visited the Owl Theater every night in the months of February, March, April and May, 1916, and that he personally knows as well

(Testimony of Francisco Borques.)

as from the reports of his officers that the chorus girls behaved themselves properly and did not indulge in any lewd pastimes and that their chorus work was the same as was observed in any theater wherein a chorus was used. That the chorus girls were not permitted to live in Mexicali; that he knows of his own knowledge that they lived in Calexico, in the state of California. That the girls were obliged to return to Calexico after their performance. That he knows of his own knowledge and having seen that the Owl Cafe had its manager there to take care of the chorus girls and not allow any immorality. That he is acquainted with defendants and that he has never observed any misconduct or disorderly act by them towards any of the girls at the Owl Theater, or at any other place. That he has observed drinking and gambling in the Owl Theater, and he has seen men under the influence of liquor, but insofar as their conduct towards the girls, he has not observed any misconduct. That as soon as there was any disorder in any part of the theater by any person under the influence of liquor, that person was immediately arrested. There was a large dancing floor in the Owl Theater where every person could dance—the chorus girls, the licensed women and any other person who came in from the Valley who cared to dance. There were also crib rooms at the back of the Owl Theater at which the licensed women were compelled to live. They were not permitted to live in any other section of the city and the chorus women were not permitted to go back into these rooms under any circumstances to visit

(Testimony of Francisco Borques.)

these women or to associate with men in that section. The gambling tables were entirely separate from the dance floor. During all this time and at any other time, no complaints were ever made to me by any person or by the United States Government concerning the conduct of the defendants towards any of their chorus women or concerning the employment of the chorus women at the Owl Cafe or concerning the chorus women's conduct towards any men or concerning the conduct of any man towards them.

STIPULATION.

(P. 335 of Transcript) MR. ROGERS: If your Honor please, the stipulation we entered into last night was only just a skeleton of the matter, and your Honor will remember that after Mr. Palmer and I agreed upon the outline of it, I suggested some other matters, and it is really in the record hardly understandable for the purposes of the jury.

(P. 336 of Transcript) MR. PALMER: I would suggest, your Honor, the Reporter read the stipulation as made, and then if there is anything further that Mr. Rogers desires a stipulation as to, if he will state that, I will then see whether or not we will stipulate that.

MR. ROGERS: When I was speaking last night, sir, it was not with the intention it should be put in such form as the jury might understand it. It was only in lawyers' language, and as we understood each other; and you remember after we had agreed upon the

first matter, then I suggested some changes and you agreed to them.

THE COURT: Well, it is all in there. The Reporter got down all that was said.

MR. ROGERS: We will try it, but I don't think it is quite understandable.

THE COURT: Well, I am inclined to think it is.

MR. ROGERS: Well, we can hear it.

THE COURT: Read, Mr. Reporter, what they said last night.

(The following colloquy between Court and counsel was read by the Reporter):

"THE COURT: Now, Mr. Rogers, in regard to these requests: Can you state what authorities you base them on, or do you want time to consider it?

"MR. ROGERS: I purpose to rely upon the authorities which we presented to your Honor at the time of your Honor's consideration of the demurrer to the indictment. I think in the papers your Honor will find a memorandum of authorities.

"THE COURT: Yes sir.

"MR. ROGERS: Those cases will be the authorities to which I will refer, and to certain charges which will be found in those cases. And so far as the matter of the introduction of this evidence which I speak of is concerned—and I will say to counsel that this is the point, so he may prepare himself—I purpose to introduce evidence concerning the laws of Mexico; that the laws of Mexico license establishments such as this; that the laws of Mexico permit games such as are played in this establishment; that the laws of Mexico, moreover, license the practice of prostitution, and

license those individuals who do practice it; and I purpose calling an expert on the foreign law, that being a matter of fact and therefore the subject of testimony,—I purpose introducing such a witness as that, to call your Honor's attention to the fact that all the acts complained of or introduced in evidence on the part of the Government as acts of immorality, are by the laws of Mexico permitted as lawful and moral. And thereupon the deduction—I will ask that we cannot in this country call an act immoral which is of itself licensed and made lawful by affirmative statute of Mexico. That is my point.

(P. 337 of Transcript) “MR. PALMER: In order to save time, I will be willing to stipulate that under the laws of Mexico prostitution is licensed, and that gambling games are licensed, and that the sale of intoxicating liquors is licensed.

“THE COURT: And anything else?

“MR. PALMER: And that this place was a licensed place under the laws of Mexico.

“MR. ROGERS: That will cover most of what I want, but I will have to call a witness—I think it is a deposition—the chief law officer of the jurisdiction, to testify that during the time which has been referred to in the testimony, he was continually supervising this place, was personally present there, with his officers and subordinates, and that at no time did he ever observe any illegal act, any immoral conduct.

“THE COURT: So far as the laws of Mexico are concerned,—

“MR. ROGERS: So far as the laws of Mexico are concerned.

“MR. PALMER: I want to insert in the statement of stipulation that I would be willing to make, that the practice of prostitution by one not licensed is a crime in Mexico.

“MR. ROGERS: Yes, that is agreeable.

“THE COURT: Now, read that, and see if you gentlemen have agreed, beginning with Mr. Palmer’s statement.

(The statement by Mr. Palmer was read).

“MR. ROGERS: Would counsel further be willing to stipulate that the word “licensed” as used by him means permitted by law, and that licenses are authorized to be issued by law for such matters?

“MR. PALMER: Yes.

(P. 338 of Transcript) “MR. ROGERS: He used the word “licensed.”

“MR. PALMER: Yes.

“THE COURT: That is, they are legalized.

“MR. PALMER: Yes, I am willing to do that.

“THE COURT: All right.

“MR. ROGERS: Now, with respect to the conduct of the place, then, I am satisfied that I will introduce only a deposition, and a showing with respect to the place itself, by the presidente—I think they call him—is that not it, Mr. Cohen?

“MR. COHEN: Yes, that is it.

“MR. ROGERS: The presidente of the jurisdiction, that he has observed this place at all times, and that

he observed at no time anything unlawful under the laws of Mexico."

MR. PALMER: I think perhaps that is the end of the stipulation.

THE COURT: That is the end of the stipulation.

MR. ROGERS: I think there was one other, if your Honor pleases. May I consult the reporter just a moment.

(Mr. Rogers consults Reporter).

MR. ROGERS: That is substantially it.

MR. PALMER: Now in reading this deposition, your Honor, it just occurred to me there was a statement there that the law of Mexico in regard to prostitution was attached to the deposition and made a part of it, and that was not read to the jury.

THE COURT: Well, it is in Spanish.

MR. PALMER: Well I think they have a translation of it, perhaps.

MR. ROGERS: Yes sir.

MR. PALMER: Have you a true translation of it?

MR. ROGERS: Yes. That is an inadvertence on my part.

(P. 339 of Transcript) MR. PALMER: Mr. Rogers, are you in a situation to say that is a correct translation?

MR. ROGERS: I am not, no sir. I would not say so, because I do not know.

MR. COHEN: By a man who lives in the district.

MR. PALMER: Are you familiar with the Spanish.

MR. ROGERS: Would your Honor permit me to

have the original deposition, with the original document?

THE COURT: Yes.

(Mr. Rogers shows the original document to Bailiff Dominguez).

MR. PALMER: Well, we have, I believe, stipulated, and I will not insist on the reading.

THE COURT: I don't see the necessity, gentlemen, of reading that.

MR. PALMER: It will take time, I suppose.

THE COURT: Mr. Rogers, I don't see the necessity of reading it. You have stipulated what the law was.

MR. ROGERS: I beg your Honor's pardon?

THE COURT: I don't see the necessity of reading that. You have stipulated what the law was.

MR. ROGERS: Yes sir; I don't think it is necessary to read it.

THE COURT: I think they can understand this stipulation better than they can that.

MR. ROGERS: Would your Honor permit me to just show the book, the regulations as they are in the book, to the jury, and while they may not be able to read the Spanish—

(P. 340 of Transcript) THE COURT: Let them see the book. It is in Spanish. "Reglamento", they call it.

(P. 341 of Transcript) MR. ROGERS: Mr. Palmer, just for the purpose of letting the jury understand it, with your Honor's permission, suppose just for the purpose of their understanding, these (indicating) are the rules with respect to prostitution in Mexico, in

Mexicali, the town of Mexicali, and that means the name, and that means the age, and that—

MR. PALMER: You ain't going to get me into that kind of a thing. I don't know.

MR. ROGERS: I think I might say without any question that these are the printed regulations.

MR. PALMER: That was sworn to by the presidente.

MR. ROGERS: I believe it is agreed that that book when issued to an individual, has a picture of the person inserted in the book, and the blanks are filled out. Here is one (showing book to Mr. Palmer). There is an original.

(The original document last referred to was marked Defendants' Exhibit D, and the same was exhibited to the jury.)

MR. PALMER: Mr. Rogers, what is the custom or the rule in the country, whether these books shall be on display at the place where the trade is carried on?

MR. ROGERS: I believe the women must be in possession of it very much as a saloon man in California has to have his license in his possession; that is, it may be called for at any time by any officer or any person, and must be produced at that time.

(P. 342 of Transcript) MR. COHEN: The book says that.

MR. ROGERS: I just glanced over it, with my very rudimentary knowledge of Spanish.

MR. PALMER: Does it have to be posted up at the outside?

MR. ROGERS: No, I don't think it has to be posted,

but it is subject to call by any person, an office or inspector or individual of any sort, and must be produced. It contains the photograph, and the name, and the age, and so forth. That book we are now showing you is an original, one that has actually been in use.

MR. PALMER: I will ask you further, Mr. Rogers, whether or not you will stipulate that under the law it is required that these women must have medical certificates also posted on the wall, where they are open to the inspection of any comer.

MR. COHEN: I can answer that. They must undergo an inspection every Friday by the medical inspectors of Mexico.

MR. ROGERS: That is why Friday is unlucky.

MR. PALMER: They don't have to have that posted? They have to keep that posted in their room?

MR. COHEN: Yes.

MR. ROGERS: "To call regularly every Friday, weekly, for a sanitary inspection, for the purpose of being examined and given a weekly certificate, and keep in a visible place in the premises, the last certificate."

(P. 343 of Transcript) THE COURT: Gentlemen, are you through with the evidence?

MR. ROGERS: I think that is all, sir.

THE COURT: Are you through for the United States attorney?

MR. ROGERS: Yes, your Honor.

THE COURT: Both sides rest.

MR. ROGERS: Yes sir.

MR. PALMER: We have no rebuttal.

(The above and foregoing was all of the evidence offered or received on the trial of the above entitled cause).

Defendant rests.

Thereupon, the Court admonished the jury and a recess was taken until ten A. M. of the next day; and thereupon, the Court instructed the jury as follows:

THE COURT: Gentlemen of the jury: It is my duty to state to you the law applicable to this case, and in your deliberations you will be bound by what I say is the law. I have decided that this indictment presents a case that is in violation of the law, and is a good indictment, and you are bound by that.

It is your exclusive province to judge of the facts of the case. You are the exclusive judges of the weight to be given to the evidence, and of the credibility of the witnesses. I have a right to comment upon the weight of the evidence, and upon the credibility of the witnesses, and in this instruction I propose to comment to some extent, upon the evidence introduced here, and I tell you that you are not bound by what I say concerning the weight to be given to the evidence, nor bound by what I may say that it proves. You must determine that for yourselves. Your right, however, to determine the weight of the evidence and the credibility of the witnesses is not arbitrary, but must be exercised with a legal discretion.

The indictment in this case was brought under Section 37 of the United States Criminal Code, charging a violation of Section 2 of what is known as the Mann

Act. Section 37 of the Criminal Code so far as it is necessary for you to consider, is as follows:

“If two or more persons conspire to * * * commit an offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be”—

punished as prescribed in said section.

The offense which it is alleged the defendants conspired to commit is a violation of Section 2 of An Act of Congress passed June 25, 1910, and sometimes designated as the White Slave Traffic Act. Section 2 of said act which the defendants are charged with having violated, insofar as it is necessary for you to consider the same, is as follows:

“Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining any ticket or tickets, or any form of transportation or evidence of the right thereto to be used by any woman or girl in interstate or foreign commerce * * * in going to any place for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent or purpose

on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to the practice of debauchery, or any other immoral purpose, whereby any such woman or girl shall be transported in interstate or foreign commerce * * * shall be deemed guilty"—

of the crime prescribed in said section, and shall be punished accordingly.

You will observe that the offense charged against the defendants is not that of violating said White Slave Traffic Act but of a conspiracy to violate.

You will be called upon to determine, among others, the following questions:

Was there such a conspiracy as alleged in the indictment and did the defendants, for the purposes of effecting the object of the conspiracy, commit any of the overt acts charged in the indictment?

If the evidence satisfies you beyond a reasonable doubt of the existence of such conspiracy, and that the defendants for the purpose of effecting the object of said conspiracy, committed one of the overt acts which the indictment alleges was committed, you will find the defendants guilty as charged in the indictment. If, however, the evidence fails to satisfy you of the existence of such conspiracy, or that the defendants for the purpose of effecting the object of said conspiracy, committed one of the alleged overt acts, you will find the defendants not guilty.

The court further instructs you that a conspiracy is a combination between two or more persons to do a

criminal or unlawful act, or a lawful act by a criminal or unlawful means.

From this definition of conspiracy it follows, of course, that there can be no conspiracy where one individual acts by and for himself only.

A mere mental purpose cannot justify a conviction of conspiracy.

A common design is of the essence of the charge.

A person, therefore, in order to become a party to a conspiracy, must combine with someone else to effect the object of the conspiracy by the means agreed upon.

There are four defendants on trial. The indictment charges that the defendants conspired together, and with other persons to the grand jurors unknown. Therefore, you may convict one of the defendants or any of them, provided, however, you cannot convict one of the defendants and acquit the others unless you find that the one defendant that you do convict conspired with some person not named in the indictment to do the things charged in the indictment.

You are instructed that the acts of Mrs. Warren Fabian cannot be considered as the acts of the defendants, or any of them, unless you believe that she was one of the conspirator and was their agent and authorized by them to do what she did do.

To constitute a conspiracy it is not necessary that there should be an explicit or formal agreement between the alleged conspirators.

Though the common design is of the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it

be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view of attaining the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.

The evidence in proof of a conspiracy may be, and from the nature of the case, generally will be circumstantial. Where such circumstantial evidence is relied upon to establish the conspiracy, or any other fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy, or other fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

If the evidence can be reconciled with the theory of innocence, the law requires that the defendants be given the benefit of the doubt and that the theory of innocence be adopted.

The Court further instructs you that while the acts or declarations of a co-conspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during the existence and in furtherance of the unlawful combination, when proven, is not only evidence against him but is evidence against the other conspirators who, if the combination is proved, is as much responsible for such act or declaration as if done or made by himself.

You must not, however, permit yourselves to use against either defendant, anything said or done outside of the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt, that at the time the things were said or done a conspiracy

existed between the parties saying and doing the things and the defendant to be affected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy.

The White Slave Traffic Act should receive a construction, and be applied to facts which will make it efficient to accomplish its intended purpose, but it should not be so enlarged or extended by judicial interpretation, or by the verdict of juries, as to take in transactions which, however reprehensible, cannot be reasonably regarded as within its aim and intent. The conduct of the defendants, however reprehensible, in general, must be such, before you can convict them, as to bring them within the intent and purpose of this act, and no disapprobation that you may have for the business of the defendants, or their general conduct, is sufficient to permit you to convict them, if you have a reasonable doubt of their guilt of the precise crime charged in the indictment.

The conspiracy must have involved an intent to violate said Act above referred to as the White Slave Act; that is to say, that the defendants intended that the women which they would transport, if any, should be placed in a situation as described in the indictment, and hereafter referred to. What was the intent with which the women were to be taken to Mexicali? Was it that they should live an honest, moral and proper life, or were they to be taken to Mexicali for the purpose of entering upon a condition which might be termed debauchery, or which tends to, and which

would necessarily and naturally lead them to a condition of debauchery?

The term "debauchery" is not a legal or technical term. There is no allegation in the indictment that the defendants conspired to transport women with a purpose or with intent to debauch them, but to place them where they would be influenced to enter upon a course of debauchery.

To debauch is to corrupt in morals or principles; to lead astray immorally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery, then, is an excessive indulgence of the body; licentiousness; drunkenness; corruption of innocence; taking up vicious habits. The term "debauchery" as used in this statute has the idea of sexual immorality. That is, it is the idea of a life which will lead, eventually, or tends to lead, to sexual immorality.

The question for you to determine, and which is a question which you alone can determine, is whether or not the influences with which the women who, the indictment alleges, the defendants were to transport, were to be surrounded did not tend to induce them to give themselves up to a condition of debauchery which, eventually, necessarily and naturally would lead to a course of immorality sexually. You know by the testimony what was the character and what was the condition or influence under which women were placed by reason of their employment and transportation. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature, relating to sexual intercourse between men and women?

The language of the statute is directed against the transportation of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purposes, or with the intent or purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to debauchery, or to engage in any other immoral practices.

It is not necessary for the Government to prove that the conspiracy was successful. Proof of the formation of the conspiracy and an overt act as charged is all that is required in that regard.

Nor is it necessary for the Government to prove that the women who were actually taken there were debauched. Nor is it necessary for the Government to prove that the surroundings would naturally lead the particular women who were taken there, into a life of debauchery as heretofore defined, provided that the defendants intended that such surroundings should have that effect.

If the defendants took them into surroundings and an environment that would naturally lead to debauchery as aforesaid, then the law is that the defendants intended the natural and necessary consequences of their act.

If the defendants contracted with the women that they took there, to the effect that said women should not become prostitutes, or engage in prostitution, or if they advised the women what to do in the event they were solicited by men to sexual indulgence, or otherwise approached concerning debauchery; if the defendants guarded and protected said women against being approached concerning debauchery or indulgence

in debauchery, to my mind that would be very strong evidence that the defendants knew that the surroundings and environment in which said women were to be placed would naturally lead to debauchery and immoral sexual relations.

Considerable has been said during the trial concerning prostitution that was being carried on at the Owl Cafe, and that what these women saw there would have a tendency to disgust them with prostitution, and to prohibit them from entering into a life of prostitution. In this connection it is my idea that it is a long step from debauchery to prostitution, and many a woman may descend to debauchery or other immoral sexual relations, and yet prostitution be repulsive to her. And you are advised to take into consideration these matters, and to bear in mind that the Government does not charge that these defendants intended that these women should become prostitutes, but simply that they should be debauched.

The fact that the Owl Cafe, the place to which it is alleged in the indictment, the defendants conspired to take women, was conducted legally under the laws of Mexico, is not a defense to this action if the surroundings were such as to lead to the consequences which I have heretofore told you are necessary in order to convict the defendants. Mexico has a perfect right, if she wishes, to authorize such places as the Owl Cafe to be run, and that is none of our business, but if women are taken out of this country to a life that leads to debauchery, Congress has made that our concern.

You are instructed that the defendants in this case

had a right to go upon the witness stand to testify in their own behalf, if they chose to do so. The law, however, expressly provides that no presumption adverse to them is to arise from the mere fact that they did not place themselves upon the witness stand. So, in this case, the mere fact that these defendants have not availed themselves of the privilege which the law gives them, should not be permitted by you to prejudice them in any way. It should not be considered as evidence either of their guilt or innocence. The failure of the defendants to testify is not even a circumstance against them and no presumption of guilt can be indulged in by the jury on account of such failure on their part.

It is not your duty to look for some theory upon which to convict the defendants, but, on the contrary, it is your duty, and the law requires you, if you can reasonably do so, to reconcile any and all circumstances that have been shown, with the innocence of the defendants, and so acquit.

You are at liberty to convict the defendants in this case solely because you believe that the morals of any community or any people would be better on account of the closing up or elimination of an establishment such as has been testified about in this case. Your duty is to determine the guilt or innocence of the defendants, or any of them, of the precise crime charged in the indictment, and, if you are not entirely satisfied of their guilt beyond a reasonable doubt, you should acquit.

Neither the finding of the indictment nor any allegation therein, raises any presumption whatever against

the defendants, but the burden of proof is on the Government, and the law presumes the defendant innocent until proven guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged. A reasonable doubt is one which is reasonable in view of all the evidence and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendants' guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

This case, like all cases triable in a court of justice, should be determined by a jury upon the evidence before them, and upon that alone, subject to the rules of law laid down for your guidance by the Court, and no juror acting conscientiously, can base his verdict upon any other consideration.

I instruct you that stipulations entered into by the attorneys in the case are to be regarded by you as evidence in the case, and that the facts stipulated to must be regarded as proven.

Juries are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true that each juror must decide the matter for himself, but he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even though in so

doing he defer to the views or opinions of others.

The bailiff will hand you verdicts—forms of verdicts. Blanks will be left for the insertion of the word “not” and nothing else will be necessary to cover in the forms of verdict except the word “not,” if you desire to use it, and the date. And when you agree upon a verdict, your foreman shall sign it and return into court. When you retire to consider of your verdict, elect one of your number foreman. And you cannot agree upon a verdict unless you are unanimously of the opinion in favor of the verdict.

MR. COHEN: If your Honor please, I desire to note an exception to each and every instruction offered on behalf of the Government.

We desire to note an exception to each and every instruction offered on behalf of the defendants and not given by your Honor.

We desire to note an exception to your Honor’s comment upon the evidence.

THE COURT: Let the exception be entered accordingly. Swear the bailiff.

(Bailiff sworn and jury retires).

That thereafter, towit, at about the hour of — o’clock A. M. of Saturday May 5th 1917, the jury returned duly and regularly into Court, their verdict finding the said defendant guilty as charged in the indictment.

That the time for sentencing the said defendant was thereupon duly continued by the Court from time to time until the 19th day of June, 1917, upon which date said defendant filed in said Court his motion for a new trial. That thereupon on said date, the Court

duly and regularly heard the motion of said defendant for a new trial and duly and regularly made its order denying said motion, to which ruling the exception of the defendant was duly made and entered, and thereupon, on the same day, defendant filed his motion in said Court in arrest of judgment and the Court thereupon heard the same and duly and regularly made its order denying said motion in arrest of judgment, to which ruling, the exception of the defendant was duly made and entered, and thereupon the Court regularly pronounced sentence upon the defendant, and adjudged that he pay a fine in the sum of One Thousand Dollars, to which sentence the exception of the defendant was duly taken and allowed.

Thereupon, on the 19th day of June, 1917, the defendant duly and regularly filed in said Court his Petition for a Writ of Error, and concurrently therewith his Assignment of Errors. That the Court at said time allowed said Writ of Error and fixed a supersedeas bond upon appeal in the sum of Two Thousand Dollars, to be duly given by the said defendant. That thereafter, towit, on the 19th day of June, 1917, said defendant gave and filed in said Court his said supersedeas bond in the sum of Two Thousand Dollars which was duly approved and allowed by said Court.

That thereupon on the said 19th day of June, 1917, a Writ of Error was duly issued in said cause, returnable before the United States Circuit Court of Appeals, for the Ninth Circuit.

That thereupon, upon said date, citation upon said Writ of Error was duly issued, served upon the United

States District Attorney and filed with the Clerk of said Court.

The Indictment, Demurrer, Order Overruling Demurrer, Petition for Writ of Error, Assignment of Errors and the various order and proceedings of the Court referred to herein, are fully set out in the printed record on appeal of the Clerk to be filed herein and ordered to be printed herewith.

And, for as much as the evidence and proceedings and matters of exception above set forth do not fully appear of record, the defendant, by his attorney tenders this Bill of Exceptions and prays that the same be signed and sealed by the Court herein, pursuant to the statute in such case made and provided.

Earl Rogers

Chas Scholz

Milton M. Cohen

Attorneys for Defendant.

PRESENTATION OF BILL OF EXCEPTIONS,
NOTICE THEREOF AND STIPULATION
FOR SETTLEMENT AND ALLOWANCE.

Defendant, F. B. Beyer, hereby presents the foregoing as his Bill of Exceptions herein and respectfully asks that the same may be allowed.

Earl Rogers

Chas Scholz

Milton M. Cohen

Attorneys for Defendant

TO ALBERT SCHOONOVER, ESQUIRE,
UNITED STATES DISTRICT ATTORNEY
FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA:

You will please take notice that the foregoing con-
stitutes and is the proposed Bill of Exceptions from
the defendant in the above entitled action, and the said
defendant will ask for allowance of the same.

Earl Rogers

Chas Scholz

Milton M. Cohen

Attorneys for Defendant

Service of the foregoing Bill of Exceptions is hereby
acknowledged this 8 day of Sept. 1917.

W. F. Palmer,

Assistant United States District Attorney for the
United States of America.

Stipulation as to correctness of Bill of Exceptions.

It is hereby stipulated that the foregoing Bill of
Exceptions is correct and that the same be settled and
allowed by the Court.

Earl Rogers

Chas Scholz

Milton M. Cohen

Attorneys for Defendant

W. F. Palmer,

Asst. United States Attorney and Attorney for the
United States of America.

Order allowing Bill of Exceptions and making the
same part of the record.

The foregoing Bill of Exceptions having been duly

presented to the Court, the same is hereby duly allowed and signed and made a part of the records in this cause.

Dated this 24th day of Nov. 1917.

Oscar A. Trippet,
Judge.

[Endorsed]: Original. No. 1176 Criminal In the United States District Court in and for the Southern District of California Southern Division United States of America Plaintiff vs. F. B. Beyer, Defendant Proposed Bill of Exceptions filed Sep. 8, 1917 at 25 min past 12 o'clock P. M. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Settled and filed Nov. 24, 1917 at 15 min. past 11 o'clock A. M. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Earl Rogers Charles Scholz & M. M. Cohen 403 California Building Phone Broadway 2626 Los Angeles, Cal. Attorneys for Defendant.

*In the District Court of the United States for the
Southern District of California Southern Division*

UNITED STATES OF AMERICA,

Plaintiff,

v.

WARREN FABIAN, DAN MALONE, and FRANK
BEYER,

Defendants.

No. 1176, Criminal.

Petition for Writ of Error.

Your petitioner, Frank Beyer, one of the defendants in the above entitled cause, brings this, his petition for

a Writ of Error, to the District Court of the United States, in and for the Southern District of California; and, in that behalf, your petitioner says: that, on the 19th day of June, 1917, there was made, given and rendered in the above entitled Court and cause, a judgment against your petitioner whereby your petitioner was adjudged and sentenced to a fine of One Thousand Dollars and your petitioner says that he is advised by his counsel and avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, giving and entering of such judgment and sentence, to the great injury and damage of your petitioner, and each and all of these errors will be more fully made to appear by an examination of said records, and by an examination of the Bill of Exceptions to be hereafter, by your petitioner, tendered and filed, and the Assignment of Errors which is filed with this petition, and, to that end, that the judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner prays that a Writ of Error may be issued, directed therefrom, to the said District Court of the United States, for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, Bill of Exceptions, Assignment of Errors, and all proceedings had and to be had in said cause, and that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has

happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner makes the Assignment of Errors filed herewith, upon which he will rely, and will be made to appear by a return of the said record in obedience to said Writ.

WHEREFORE, your petitioner prays the issuance of a Writ as herein prayed and that the Assignment of Errors filed herewith may be considered as his assignment upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that he be awarded a supersedeas upon said judgment and all necessary process, including bail.

Frank Beyer,
Petitioner

Earl Rogers
Chas. Scholz
Milton M. Cohen,
Attorneys for Defendant.

[Endorsed]: No. 1176, Crim. In the United States District Court in and for the Southern District of California Southern Division United States of America Plaintiff vs. Warren Fabian, Dan Malone and Frank Beyer, Defendants Petition For Writ Of Error (Frank Beyer) Received copy of the within Petition this 19 day of June 1917 W. F. Palmer Assist. U. S. Atty Filed Jun 19, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Earl Rogers Charles Scholz & Milton M. Cohen 403 California

Building Phone Broadway 2626 Los Angeles, Cal.
Attorneys for Defendants

*In the District Court of the United States for the
Southern District of California Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

v.

WARREN FABIAN, DAN MALONE, and FRANK
BEYER,

Defendants.

No. 1176, Criminal,

Assignment of Errors.

Comes now Frank Beyer, the defendant above named, and files the following statement and assignment of errors, upon which he will rely in the prosecution of a writ of error of the above entitled cause, a petition for which writ, on behalf of said defendant, is filed at the same time with this assignment.

I.

The Court erred in overruling the demurrer of the defendant to the indictment in said cause, for the following reasons:

a. That said indictment does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America.

b. That said indictment does not substantially conform to or comply with the requirements of Section 950 of the Penal Code of the State of California, the state in which this Court is holden.

c. That said indictment does not substantially conform to or comply with the requirements of Section 951 of the said last mentioned code.

d. That said indictment does not substantially conform to or comply with the requirements of Section 952 of the said last mentioned code.

e. That said indictment is not direct or certain as respects the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

That said indictment is not direct or certain sufficiently to inform the defendants of the particular circumstances of the offense with which they are attempted to be charged.

That said uncertainty consists in the following matters:

That it is not alleged in the said indictment, that the defendants conspired to transport or cause to be transported, or to aid or assist in obtaining transportation for, or in transporting, in foreign commerce, from the City of Los Angeles, State of California, or elsewhere, to the town of Mexicali, in the Republic of Mexico, or elsewhere, certain women or girls, for the purpose of debauchery within the purview of the statute mentioned in said indictment.

It is nowhere alleged in said indictment that the women or girls mentioned in said indictment were transported for, or for the purposes of, prostitution, debauchery, or other immoral purpose of the same kind, or that the said girls, as a matter of fact, did commit any such acts or things.

It is not alleged in said indictment that the defendants conspired to transport or cause to be transported, or to aid or assist in obtaining transportation for, or in transporting, in foreign commerce, any women or girls, for any sexually immoral purpose, or that any acts specified in said indictment were by defendants intended to result in the commission of said immoral acts in the statute named, prohibited or set forth.

It is not alleged in said indictment that any of the immoral acts attempted to be set forth as purposes for which the said women or girls were transported or caused to be transported were by defendants intended to conduce or lead to sexual immorality, prostitution, debauchery, or other immoral acts of the same kind, or that said acts were calculated by defendants to lead or cause said women or girls to commit said immoral acts of said kind.

There is no allegation in said indictment of the commission of any sexually immoral acts on the part of any women or girls transported or caused to be transported by defendants.

f. Said indictment further is uncertain and insufficient in this, that the specific acts set forth in said indictment, as respects each defendant, or the overt acts alleged as respects each defendant, are not alleged to have been intended by the defendants to, or calculated to, conduct to or cause any of the immoral acts prohibited by the statute mentioned, or referred to in the statute mentioned, as the purpose for which said women or girls were transported, or caused to be transported.

g. Said indictment further is uncertain and insufficient in that it is nowhere alleged in said indictment

that defendants, or any of them, conspired to transport or cause to be transported, or to aid or assist in obtaining transportation in foreign commerce of any women or girls who did commit, or were by defendants intended to commit, or to attempt to commit, or by defendants caused, enticed or induced to commit or to attempt to commit, or by any person caused, enticed or induced to commit, or to attempt to commit, any acts of sexual immorality whatever, or any acts of prostitution, debauchery, or other immoral acts of the same kind.

h. That the grand jury by which the indictment was found had no legal authority to inquire into the offense charged.

i. That the indictment shows, upon its face, that all overt acts alleged to have been committed in pursuance of the alleged conspiracy are alleged to have been committed after the return of said indictment.

j. That the said indictment was filed on the twentieth day of December, 1916, and is alleged to have been found and returned on the second day of January, 1916, and the conspiracy is alleged to have been formed on the first day of January, 1916, namely, one day before the finding of the indictment, and the overt acts committed in pursuance thereof are alleged to have been performed at various dates later than the finding and return of said indictment, to-wit: in January, 1916.

And the defendants exception to the overruling of said demurrer was duly taken and allowed.

II.

The Court erred in denying the motion of the de-

fendant, Frank Beyer, to quash the indictment in said cause, for the following reason:

a. That said indictment was not found, returned, presented, or endorsed or filed in the manner prescribed by law, nor was the said indictment returned by a Grand Jury having jurisdiction to hear testimony or return an indictment in the matter pending, nor was the said indictment filed when presented or returned.

And the defendant's exception to denial of the motion to quash the indictment was duly taken and allowed.

III.

The court erred in overruling the objection of the defendant to the questions propounded to the witness, Sallie Margaret Claxton, in reference to a conversation which the witness had with defendant, which questions, objections, answers and exceptions are as follows:

Q Now, did you have any conversation with the defendant Warren Fabian about going to Mexicali?

MR. ROGERS: That is objected to as incompetent, irrelevant and immaterial, and no foundation has been laid. I think the same objection that the authority of Mr. Fabian has not been shown to bind the others, and particularly with respect to a conversation he may have had, in view of the concession of counsel that the so-called conspiracy evidence will consist of employment to do certain things in a certain way—in other words, he was an employee, and therefore bound by the terms of his employment, until some conspiracy of another sort is shown, if counsel can do it; but I think that ought to be shown first, and the foundation laid.

THE COURT: Well, the evidence is undoubtedly admissible against Fabian, and would not bind the others unless it is shown that a conspiracy existed prior to the time that it was done, and existed at that time, and that this was part of the scheme, or in furtherance of it, or something or part of the *res gestae*.

MR. PALMER: Of course, your Honor, if we would offer the suggestion—

THE COURT: The objection will be overruled. Proceed.

MR. ROGERS: We except.

IV.

The Court erred in overruling the objection of the defendant to the following questions propounded by plaintiff to the witness, Sallie Margaret Claxton. (P. 60 of Transcript):

Q You knew what they were going back there for, didn't you?

A. Why it was plain enough to be seen.

Q. Anyone could see what that was?

MR. ROGERS: I object to that as calling for a conclusion or opinion and incompetent, irrelevant and immaterial.

THE COURT; The objection will be sustained.

MR. ROGERS: I move to strike out that answer, "It was plain enough to be seen," as incompetent irrelevant and immaterial and not responsive.

MR. PALMER: I think, your Honor, that it is not open to that objection.

THE COURT: Well, I would not sustain the position of the United States Attorney on that propo-

sition. I think the evidence, however, is material, and a proper answer, and a proper case for the witness to give an opinion on. The motion will be denied.

MR. ROGERS: Exception.

Q BY MR. PALMER: How many women were there that stayed in the rooms back of the dance hall that you speak of?

MR. ROGERS: Objected to.

A I couldn't tell you.

Q By MR. PALMER: Was there more than one?

MR. ROGERS: Objected to.

A Yes sir.

MR. ROGERS: I think the witness has plainly stated that she has never been back there, and she never went back of that dressing room, and I don't think she can tell from her own knowledge how many women did live back there, or stayed there, as counsel says now, and it is incompetent, irrelevant and immaterial. The witness answered so quickly I could not object.

THE COURT: Well, I will not regard that, Mr. Rogers. If I thought the evidence was immaterial or impertinent, I would strike it out, but I think the answer is—the question and answer are both appropriate. The jury will judge the materiality of it, or the weight of it, I mean.

MR. ROGERS: We except.

V.

The Court erred in overruling the objection of the defendant to the following questions propounded by the plaintiff to the witness Sallie Margaret Claxton (Page 75 of Reporter's Transcript):

Q BY THE PLAINTIFF: Mrs. Claxton, at the time that you were employed in the Owl Cafe, were you, while you were engaged in that employment, on the dance floor, and about that house, at any time, solicited by men to have illicit sexual relations with them?

MR. ROGERS: Objected as incompetent, irrelevant and immaterial, no foundation laid; hearsay so far as the defendants are concerned; and the time and place and persons present not stated; no foundation laid, in that the defendants are not shown to have had any relation to the matter.

THE COURT: The objection will be overruled.

MR. ROGERS: Note an exception.

MR. PALMER: Read the question.

(Last question read by the Reporter)

A No sir.

Q What was said to you, if anything, at the time you had the conversation with Dan Malone in Los Angeles about how much the expense was on a trip to Calexico.

MR. ROGERS: That is objected to upon the ground that no foundation has been laid for it; it is leading and suggestive. I will not object, except on the part of other defendants, for the lack of foundation to a question which would show what did Mr. Malone say, but it is leading and suggestive.

THE COURT: The objection will be overruled.

MR. ROGERS: Note an exception.

VI.

The Court erred in overruling the objection of the defendant to the following questions propounded by

the plaintiff to the witness Sallie Margaret Claxton (Page 129 of Reporter's Transcript):

Q BY MR. PALMER: What was the largest amount that you got at the end of the day during the first week while you were at the old place from the percentage on drinks?

MR. ROGERS: May my objection follow this line of interrogation?

THE COURT: Yes, sir.

MR. ROGERS: And my exception, also?

THE COURT: Yes.

MR. PALMER: Read the question.

(Last question read by the reporter.)

A Eleven Dollars, I think it was—eleven or twelve; somewheres in there.

Q What was done with the men who drank in that part of the house when they became intoxicated?

MR. ROGERS: Objected to as assuming a fact not in evidence, irrelevant, incompetent and immaterial, no foundation laid, no showing that any man did become intoxicated.

THE COURT: Objection overruled.

MR. ROGERS: Exception.

THE COURT: Answer the question.

A I don't know; I guess they must have went home. There was not anybody back in there. They never stayed until they got intoxicated.

The testimony of the witness, Sallie Margaret Claxton, in reference to the matters in issue, upon failure of the Government to show its connection, or to show any intent on the part of the defendant either to trans-

port, or aiding or persuading to transport, any woman for immoral purposes, et cetera, or tending, in any way, to show their debauchment or the tendency of the surroundings to lead to their debauchment, was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that, by its admission, the jury were lead to convict the defendant by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause.

VII.

The Court erred in overruling the objection of the defendant to the following questions propounded by the plaintiff to the witness Miss Alma Person (Page 149 of Reporter's Transcript):

Q Now, what was said in that conversation, and who said it?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial, and hearsay.

THE COURT: Objection overruled.

MR. ROGERS: And no foundation laid. Exception.

A Mr. Fabian was telling me about the place down there, and asked me if I would want to go down.

VIII.

The Court erred in overruling the objection of the defendant to the following questions propounded by the plaintiff to the witness Miss Alma Person (Page 152 of Reporter's Transcript):

Q Last year, March, 1916. Now, what, if anything, was said to you, and by whom was it said, about how you should go?

MR. ROGERS: Objected to as incompetent, irrele-

vant and immaterial, and not binding on the defendants.

THE COURT: Objection overruled.

MR. ROGERS: Exception, please.

THE COURT: Answer the question, please.

A I didn't understand that.

MR. PALMER: Well, I will change the question.

Q Did Mr. Fabian or Mr. Malone tell you where to go, to start?

MR. ROGERS; That is objected to for the same reasons—I beg pardon.

Q BY MR. PALMER: (Continuing)—or what did they say to you about that?

MR. ROGERS: Objected to for the same reasons.

A To go to Calexico?

Q Yes.

A He said we were to go to Calexico, and live on the American side and work on the Mexican side.

Q Was there anything said to you by either of those men about the station you were to go to, and when you were to go?

A No, they did not tell us when; they told us when we did take a train to get off at Calexico.

Q Was anything said to you about what railroad to go over, and when you were to start?

A No; Mrs. Fabian took me; I went with Mrs. Fabian.

Q How is that?

A I went with Mrs. Fabian to the train.

Q Went with Mrs. Fabian?

MR. ROGERS: I move to strike that answer out, because it is incompetent, irrelevant and immaterial

and not binding upon the defendants, and no foundation.

THE COURT: Objection overruled, and motion denied.

MR. ROGERS: Exception.

Q. BY MR. PALMER: Now, when you went to the station, who did you meet there?

A Well, nobody.

IX.

The Court erred in overruling the objection to the defendant to the following questions propounded by the plaintiff to the witness Miss Alma Person (Page 154 of Reporter's Transcript):

Q. Now, did you receive any money at the station to pay your fare with?

A Mrs. Fabian gave us the money.

MR. ROGERS: I object to that as hearsay, incompetent, irrelevant and immaterial, and not connected with the defendants. No issue is made on that, and no foundation has been laid, and I move to strike the answer out. Please don't answer so rapidly. I would like to object occasionally.

THE COURT: Well, so far, the answer is immaterial. It does not relate to the defendants. She said Mrs. Fabian furnished the money.

Q BY MR. PALMER: How much money did she give you?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial and not within the issues, and no foundation laid.

MR. PALMER: The indictment, your Honor,

charges that these defendants and others were engaged in this conspiracy.

MR. ROGERS: That has not been proven. The fact it is charged does not make any difference.

THE COURT: Mr. Rogers, they could claim that Mrs. Fabian was in this conspiracy and one of the conspirators.

MR. ROGERS: I know they could claim it, if your Honor pleases, but they have ousted themselves from that claim by calling her to the witness stand a few moments ago. They know they cannot call a defendant.

MR. PALMER: She is not a defendant.

MR. ROGERS: And they must, of course, prove their conspiracy first. They cannot assume that because the indictment so charges, that a person is in a conspiracy, without any showing to that effect.

THE COURT: Well, I think it is material to show that she got the money from somebody else and did not pay her own way there; and if they can connect it up with the defendants, let them do it. The objection will be overruled.

MR. ROGERS: We except.

MR. PALMER: Read the question, please.

(Question read)

A Ten dollars.

Q How much, if any, did she give to Anna Gregory?

MR. ROGERS: The same objection.

THE COURT: Overruled.

MR. ROGERS: We except.

A Ten Dollars.

Q BY MR. PALMER: Was she with you when you bought your ticket?

A Yes sir.

MR. ROGERS: May my objection follow this whole matter?

THE COURT: Yes, sir, you may have an objection and exception—an objection to all questions concerning the buying of this woman's ticket, and the others by Mrs. Fabian, and to the ruling of the court an exception.

X.

The Court erred in overruling the objection of the defendant to the following questions propounded by the plaintiff to the witness Miss Alma Person (Page 174 of Reporter's Transcript):

Q Do you know whether that was a crib room?

A I don't know; I never saw the door open, or nothing.

Q Never saw the door open. Did you see women there that were practicing prostitution?

MR. ROGERS: Objected to as calling for a conclusion or opinion, incompetent, irrelevant and immaterial, and no foundation laid.

MR. PALMER: I will change the question.

THE COURT: I think the witness has got a right to state how far she knows about it.

MR. ROGERS: We except.

THE COURT: Answer the question.

(Question read)

A I didn't know what they were doing.

Q BY MR. PALMER: Did you see women and men going together back into that hallway?

MR. ROGERS: The same objection as before made.

THE COURT: Objection overruled.

MR. ROGERS: We except.

XI.

The Court erred in overruling the objection of the defendant to the following questions propounded by the plaintiff to the witness Miss Alma Person (Page 177 of Reporter's Transcript):

Q BY MR. PALMER: You knew what the other women were doing there, did you?

MR. ROGERS: Objected to as incompetent, irrelevant and immaterial, and not within the issues, and no foundation laid.

THE COURT: What is the question?

(Question read)

THE COURT: The objection will be overruled.

MR. ROGERS: We except again.

A Well, I knew in a way; I didn't know very much about it.

Q By Mr. Palmer: That is, you never saw what they did?

A No sir.

XII.

The Court erred in overruling the objection of the defendant to the following questions propounded by the plaintiff to the witness Miss Alma Person (Page 199 of Reporter's Transcript):

Q BY THE COURT: You knew there were women there who were prostitutes, did you, at the time?

A I didn't know they were prostitutes.

MR. ROGERS: I object to calling for the conclusion or opinion of the witness, if your Honor pleases. Her idea that they were prostitutes, I have no objection to your Honor inquiring for, but to characterize them as her knowing them to be such. I must ask your Honor—

Q BY THE COURT: Were there women there that were reputed to be prostitutes?

A I didn't know.

Q You didn't know?

A No sir.

Q There were women there that you were asked not to associate with?

A Yes sir.

Q Why were you directed not to associate with them?

A I was never told.

Q Never told why?

A No sir.

Q You knew these women roomed back of the cafe there, in back of the stage?

A I didn't know where they roomed. I saw them go back there, but I didn't know if they lived there or not.

Q You saw them go back there with men?

A Sometimes.

Q And you had an idea of the purpose for which they were going?

A No sir.

Q You did not. Now did you feel ashamed by being brought in contact, as you were, with those women?

MR. ROGERS: I object to that, if your Honor

pleases, "being brought in contact as you were," upon the ground that the witness has said she never spoke to any of them; she never sat with any of them, or ate with any of them, or drank with any of them.

The testimony of the witness, Miss Alma Person, in reference to the matters in issue, upon the failure of the Government to show its connection, or to show any intent on the part of the defendant, either to transport, or aiding or persuading to transport, any women for immoral purposes, et cetera, or tending, in any way, to show their debauchment or the tendency of the surroundings to lead to their debauchment, was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that, by its admission, the jury were led to convict the defendant by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause.

XIII.

The District Attorney, by his conduct (Reporter's Transcript, page 220) committed prejudicial error in making declaration before the jury which prejudiced the minds of the jury towards the defendant, as will appear by statement of Mr. Palmer.

MR. PALMER: Who has been, by the objection of counsel, prevented from being examined.

MR. ROGERS: I take exception to the statement of counsel in these circumstances and characterize it as legal misconduct. I don't speak of it as personal misconduct, you understand, but I take exception as legal misconduct.

The fact of the District Attorney's statement in the

presence of the jury that a witness had been prevented from being examined on account of objection of counsel for defendant, and the fact that the reason for the witness, Mrs. Warren Fabian, not testifying was on account of the ruling of the Court, the defendant hereby assigns the statement of the District Attorney as error and misconduct for the reason that it was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that, by the District Attorney's statement, the jury were led to convict the defendant by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause.

XIV.

The Court erred in overruling the objection of the defendant to the following questions propounded by the plaintiff to the witness Grace Covert (Page 220 of Reporter's Transcript):

Q BY MR. PALMER: Did you receive any communication from Mrs. Fabian in answer to your letter?

MR. ROGERS: Objected to as immaterial, incompetent and irrelevant, on the ground that Mrs. Fabian is not shown to be a party to the conspiracy.

THE COURT: I will overrule the objection.

MR. PALMER: Read the question.

(Last question read by the Reporter)

A Yes, I got a telegram.

The testimony of the witness, Miss Grace Covert, in reference to the matters in issue, upon failure of the Government to show its connection, or to show any intent, on the part of the defendant, either to transport or aiding or persuading to transport, any women

for immoral purposes, et cetera, or tending, in any way, to show their debauchment or the tendency of the surroundings to lead to their debauchment, was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that, by its admission, the jury were led to convict the defendant by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause.

XV.

The Court erred in overruling the objection of the defendant to the questions propounded to the witness, Grace Covert, in reference to a contract alleged to have been the one witness was working under, which questions, objections, answers and exceptions are as follows: (P. 227 of Transcript)

Q This is the contract that you worked there under, is it?

A Yes sir.

MR. ROGERS: Well, that is calling for a conclusion and opinion, and incompetent. The circumstances of her signing it may possibly be competent, but that is certainly a conclusion.

MR. PALMER: We offer the contract in evidence.

MR. ROGERS: Objected to as no foundation laid, irrelevant, incompetent and immaterial.

THE COURT: Let me see it. (Receiving paper from Mr. Palmer) I am inclined to think, Mr. Palmer, you should prove the execution of the contract by the other party, or have some evidence on the subject.

Q BY MR. PALMER: Did you see the contract written?

A I don't remember.

Q You don't remember? Is that your signature there? (Exhibiting paper to the witness)

A Yes sir.

Q Do you know Dan Malone?

A Yes sir.

Q Don't you know that Dan Malone wrote that contract? A No.

Q Did you see him sign his name to it there?

A I don't remember.

Q You don't remember? Your Honor, we offer this in evidence.

MR. ROGERS: Objected to, no foundation laid, incompetent, irrelevant and immaterial.

THE COURT: Is that the contract, you say, under which you worked?

A Yes sir.

THE COURT: I will overrule the objection.

THE CLERK: Government's Exhibit No. 3.

THE COURT: What exhibit is it marked?

THE CLERK: No. 3, your Honor, Government's Exhibit 3.

MR. PALMER: (Reading)

THEATRICAL CONTRACT.

Mexicali, B. C., Mexico, March 28, 1916.

Contract between Grace Claire and the Owl Cafe.

I, Grace Claire, this day and date, March 28th, 1916, at Mexicali, Mexico, enter into the following described contract:

Indefinite engagement at \$30 per week for a period of 2 weeks, and \$25 for the following indefinite weeks, to appear in chorus act commencing March 28, 1916;

to appear not to exceed six acts each evening. Working hours 7:30 p. m. to 3 p. m.

Privilege retained by the Owl Cafe for an extended engagement.

Disorderly conduct or prostitution shall be cause for immediate dismissal and cancellation of this contract.

Percentage on drinks for women 40 per cent, except Schlitz beer, which shall be 50 per cent.

All performers to be governed by house rules.

Witness our hands and seal this 28th day of March, 1916, at Mexicali, B. Cfa., Mexico.

The Owl Cafe, By D. Malone.

Grace Claire.

Without laying any foundation for the admission of the Government's exhibit three (3), and upon the objection being made that the evidence was incompetent, irrelevant and immaterial, the defendant hereby assigns its admission in evidence as error, for the reason that it was highly prejudicial in its character, and that, in view of all the other evidence in the case, it is shown that, by its admission, the jury were led to convict the defendant by reason of passion and prejudice and upon testimony erroneously admitted, and not upon the legal evidence introduced at the trial of said cause, and the exception of the defendant to such objection and ruling of the Court was duly taken and allowed.

XVI.

The Court erred in overruling the objection of the defendant to the question propounded by the plaintiff to the witness Barney Morris (Page 263 of Reporter's Transcript):

Q BY MR. PALMER: Now, I will ask you, sir, whether or not the name that you have just seen there, F. B. Beyer, on this exhibit 4 for identification, is the signature of F. B. Beyer?

MR. ROGERS: Objected to as no foundation laid, incompetent, irrelevant and immaterial. The foundation as an expert is not laid, and the matter itself is immaterial.

THE COURT: Objection overruled.

MR. PALMER: Read the question.

(Question read)

A The signature is rather crowded there, although it looks like the signature.

Q It looks like the signature of Mr. Beyer, as you know it?

A Yes, it does.

MR. ROGERS: The same objection.

Q BY MR. PALMER: Would you say it is his signature?

A. I would not swear to it; it looks like his signature.

MR. ROGERS: I wanted you not to answer until I had a chance to object.

A I beg your pardon.

MR. ROGERS: I am objecting as incompetent, irrelevant and immaterial, and no foundation laid. If my objection may follow this all the way through, I won't continue to repeat it.

THE COURT: The objection may follow it. Objection overruled.

MR. PALMER: Now, your Honor, we offer in

evidence the paper that has just been marked as United States Exhibit 4.

MR. ROGERS: It is objected to; no foundation laid, not properly identified, incompetent, irrelevant and immaterial.

THE COURT: Let's see it.

(The paper was handed to the Court)

Q BY THE COURT: What did you say your name was?

A Barney Morris.

Q How many times have you seen the signature of F. B. Beyer?

A Oh, a number of times.

Q Have you had correspondence with him?

A Yes, I have had a few letters.

Q Now, in your opinion, is this his signature, or is it not?

A It looks like his signature.

Q Well, what is your opinion about it?

A My opinion is that it is his signature.

THE COURT: The objection will be overruled.

MR. PALMER: (Reading)

PLAINTIFF'S EXHIBIT 4

THEATRICAL CONTRACT, Mexicali, B. C., Mexico. 3/19/16. Contract between Lela Cavell and the Owl Cafe.

I, Lela Cavell, this day and date, March 19, at Mexicali, Mex., enter into the following described contract: Two weeks engagement at \$30 per week, for a period of two weeks, and \$25 for the following weeks, to appear in chorus act, commencing 3/19/16,

to appear not to exceed six acts each evening. Working hours 7:30 p. m. to 3 a. m.

Privilege retained by the Owl Cafe for an extended engagement. Disorderly conduct or prostitution shall be cause for immediate dismissal and cancellation of this contract.

Percentage on drinks for women, 40 per cent. except Schlitz beer, which shall be 50 per cent., All performers to be governed by house rules.

Witness our hands and seal this 19th day of March, 1916, at Mexicali, B. Cfa. Mexico.

The Owl Cafe, by F. P. Beyer,
Lela Cavell.

Without laying any foundation for the admission of the Government's exhibit four (4), and upon the objection being made that the evidence was incompetent, irrelevant and immaterial, the defendant hereby assigns its admission in evidence as error, for the reason that it was highly prejudicial in its character, and that, in view of all the other evidence in the case, it is shown that, by its admission, the jury were led to convict the defendant by reason of passion and prejudice and upon testimony erroneously admitted, and not upon the legal evidence introduced at the trial of said cause, and the exception of the defendant to such objection and ruling of the Court was duly taken and allowed.

XVII.

The Court erred in overruling the objection of the defendant to the questions propounded by the plaintiff to the witness C. F. Willard (Page 285 of Reporter's Transcript):

Q BY MR. PALMER: Mr. Willard, I will ask you to state whether or not you sold to Mrs. Warren Fabian two tickets to be telegraphed to Bisbee, Arizona, to be used from Bisbee, Arizona, to Calexico, California, by Grace Claire and Grace Fay?

MR. ROGERS: Objected to as irrelevant, incompetent and immaterial, and no foundation laid, and not within the issues.

THE COURT: The objection will be overruled.

A Yes sir, I did.

Q BY MR. PALMER: When?

A March 25th, 1916.

MR. ROGERS: May my objection follow this whole line?

MR. PALMER: Oh yes.

Q If you know whether or not the tickets were actually telegraphed to Bisbee, Arizona, you may state.

MR. ROGERS: Objected to as irrelevant, incompetent and immaterial, calling for a conclusion or opinion, no foundation laid, and not the best evidence.

THE COURT: The objection is overruled.

A Yes sir; they were.

XVIII.

The Court erred in overruling the objection of the defendant to the questions propounded by the plaintiff to the witness C. F. Willard (Page 295 of Reporter's Transcript):

MR. ROGERS: I move to strike out all reference to the ticket or to the stub, or writing, on the ground that no foundation has been laid; it is incompetent,

irrelevant and immaterial, and the testimony is not the best evidence.

THE COURT: The motion will be denied. Call your next witness.

The testimony of the witness, C. F. Willard, in reference to the matters in issue, upon failure of the Government to show its connection, or to show any intent on the part of the defendant, either to transport, or aiding or persuading to transport, any women for immoral purposes, et cetera, or tending, in any way, to show their debauchment or the tendency of the surroundings to lead to their debauchment, was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that, by its admission, the jury were led to convict the defendant by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause.

XIX.

The Court erred in rendering its judgment in this cause against the defendant for the reason that the indictment in said cause does not charge the defendant with any offenses against or violation of the laws of the United States of America.

XX.

The Court erred in rendering its judgment in this cause against the defendant for the reason that the evidence introduced at the trial of said cause was not sufficient to justify the verdict of the jury therein or the judgment of the Court against the defendant.

XXI.

The Court erred in rendering its judgment in this cause against the defendant for the reason that the

testimony did not show or tend to show that the defendant had committed any offense set out, or attempted to be set out, in the indictment.

XXII.

The Court erred in rendering its judgment in this cause, against the defendant, for the reason that the testimony introduced at the trial of said cause did not tend to connect the defendant with the commission of any offense set out in the indictment.

XXIII.

The Court erred in rendering its judgment in this cause against the defendant for the reason that the testimony introduced at the trial of said cause did not show, or tend to show, that the defendant did, knowingly or otherwise, persuade, induce and entice any women to go from one place to another in foreign commerce.

XXIV.

The Court erred in giving the following instruction to the jury: (P. 7 Reporter's Tr. of Instructions)

The term "debauchery" is not a legal or technical term. There is no allegation in the indictment that the defendants conspired to transport women with a purpose or with intent to debauch them, but to place them where they would be influenced to enter upon a course of debauchery.

To debauch is to corrupt in morals or principles; to lead astray immorally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery, then, is an excessive indulgence of the body; licentiousness; drunkenness; corruption of innocence; taking up vicious habits. The term "debauch-

ery" as used in this statute as the idea of sexual immorality. That is, it is the idea of a life which will lead, eventually, or tends to lead, to sexual immorality.

The question for you to determine, and which is a question which you alone can determine, is whether or not the influences with which the women who, as the indictment alleges, the defendants were to transport, were to be surrounded did not tend to induce them to give themselves up to a condition of debauchery which, eventually, necessarily and naturally would lead to a course of immorality sexually. You know by the testimony what was the character and what was the condition or influence under which women were placed by reason of their employment and transportation. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature, relating to sexual intercourse between men and women?

The language of the statute is directed against the transportation of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purposes, or with the intent or purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to debauchery, or to engage in any other immoral practices.

It is not necessary for the Government to prove that the conspiracy was successful. Proof of the formation of the conspiracy and an overt act as charged is all that is required in that regard.

Nor is it necessary for the Government to prove that the women who were actually taken there were debauched. Nor is it necessary for the Government

to prove that the surroundings would naturally lead the particular women who were taken there, into a life of debauchery as heretofore defined, provided that the defendants intended that such surroundings should have that effect.

If the defendants took them into surroundings and an environment that would naturally lead to debauchery as aforesaid, then the law is that the defendants intended the natural and necessary consequences of their act.

If the defendants contracted with the women that they took there, to the effect that the said women should not become prostitutes, or engage in prostitution, or if they advised the women what to do in the event that they were solicited by men to sexual indulgence, or otherwise approached concerning debauchery; if the defendants guarded and protected said women against being approached concerning debauchery or indulgence in debauchery, *to my mind that would be very strong evidence that the defendants knew that the surroundings and environment in which said women were to be placed would naturally lead to debauchery and immoral sexual relations.*

Considerable has been said during the trial concerning prostitution that was being carried on at the Owl Cafe, and that what these women saw there would have a tendency to disgust them with prostitution, and to prohibit them from entering into a life of prostitution. In this connection it is my idea that it is a long step from debauchery to prostitution, and many a woman may descend to debauchery or other immoral sexual relations, and yet prostitution be repulsive to

her. And you are advised to take into consideration these matters, and to bear in mind that the Government does not charge that these defendants intended that these women should become prostitutes, but simply that they should be debauched.

The fact that the Owl Cafe, the place to which it is alleged in the indictment, the defendants conspired to take women, was conducted legally under the laws of Mexico, is not a defense to this action if the surroundings were such as to lead to the consequences which I have heretofore told you are necessary in order to convict the defendants.

to the giving of which instructions the exception of the defendant was duly taken and allowed.

XXV.

The Court erred in refusing to give the jury the following instructions requested by the defendant to which refusal the defendant objected and excepted:

You are instructed that intent with which an act is done is a material element of the crime, if such act is, by day, made a crime. While every man is presumed to intend the natural and probable consequence of his act which he voluntarily does, yet, a necessary and substantial element of any offense is a criminal intent. If you have a reasonable doubt as to whether or not the defendants intended that the women and girls referred to in the indictment should give themselves up to debauchery, or to the practice of other immoral acts of a sexual nature, or prostitution, then you must acquit the defendants. The intent with which an act is done is a material element to be considered, and you

are not at liberty to disregard the question of intent, and, if you have a reasonable doubt upon this matter of intent, as I have instructed you, you must give the benefit of this doubt to the defendants, and acquit them.

The standards of morality may, and doubtless do, differ between two countries. Each country has a right to determine, for itself, by law, what acts may be done and what acts may not be done in such country, and, though an act may be forbidden by the laws of California or the laws of the United States, yet, if such act is permitted and made lawful by the laws of the Republic of Mexico, in certain circumstances and conditions, where those circumstances exist and those conditions are complied with, such act or acts cannot be considered as unlawful or immoral because of a different standard of immorality or a different law existing in the United States, or in the State of California.

Where the laws of the Republic of Mexico permit a thing to be done, under license, in that country, the doing of such act in that country cannot be considered by you as legally forbidden or as unlawful, because such act may, perchance, be unlawful in this Country.

The defendants are charged with a conspiracy to transport certain women named in the indictment to a foreign country for the purposes which have been referred to in these instructions. There is, in evidence before you, a stipulation which you are to regard as evidence that the laws of the Republic of Mexico make the practice of prostitution lawful, in certain circumstances and in certain conditions, and

that licenses for such practice are issued to various persons, and that such laws make the playing and conducting of certain games of chance lawful, and that licenses are issued for the operation of such games, and that the sale of liquor is licensed and lawful in the Republic of Mexico.

In considering whether or not the defendants conspired to transport the girls and women referred to for immoral purposes, you must consider that the laws of Mexico make the acts, just now mentioned, lawful and permissible. It is, therefore, not to be considered by you that the laws of the United States or the laws of the State of California make such practices or things unlawful. The government of the country where acts are performed has sole jurisdiction to determine the quality of those acts, and the fact that such acts are made unlawful or considered immoral in another country is of no consequence.

No act, which is lawful in a foreign country, is legally immoral or unlawful because such act is forbidden by the statutes and laws of another country, such as the United States for instance, or the State of California.

No act can be considered as immoral, in the legal sense, which is licensed and permitted by the laws of the country in which it is done.

XXVI.

The District Attorney, by his conduct (Pages 30 and 31, Transcript of Closing Argument to the Jury), committed prejudicial error in addressing the jury upon a vital point concerning which the evidence was

absolutely contrary to his statement, which evidence, objections and exceptions appear as follows:

(MR. PALMER) Now, gentlemen, I want to know why it was, if these girls were absolutely protected when they were first taken down there in March, 1916, and that no man ever made any proposition that was illegal or immoral to them, that no man ever visited their rooms, that no man ever went with them to their rooms,—I want to know why it was they added upon this contract these other contracts, and said they must not take men to their rooms where they lived. What was the reason for adding that? Why was it excepted, gentlemen? And afterwards that was printed in the contracts that were shown you by Mr. Rogers and introduced in evidence here; that thing was afterwards printed in the contract, after it had been written. Now, why was it, if these girls never heard of anything immoral, if it never was suggested to them, if no one ever visited them in their rooms,—why was that change made in the contract? That is what I want to know. Why, the evidence shows this, that these men knew that the girls there were having visitors in their rooms where they lived, in the Virginia Hotel, and they had to put that in there so they could control that thing. That is what the evidence shows.

MR. COHEN: Excuse me, Mr. Palmer. Once again, if your Honor please, I desire to except to the District Attorney's remarks. There is no evidence here that shows that the girls were having men come into their rooms. I desire to except to that. I don't want to appear captious, but there is absolutely no evidence at all of that kind.

MR. PALMER: Gentlemen, you will bear me out when I say there is evidence, and that this is it. Now, if I am wrong about it, all right. That is the evidence there. I say to you the girls swore nobody ever did visit them in their rooms. I say to you the girls all swore to that. I say to you, nobody testified that anybody ever did visit them in their rooms. But the contracts, written and prepared by these defendants show that they did, and they wanted to protect themselves from that thing, and put it into these contracts. That is what the evidence in this case shows, absolutely; it shows it.

The testimony of the People's witnesses was to the effect that the girls never received any persons in their rooms where they lived at the Hotel Virginia at Callexico, and, further, the testimony showed that they were instructed not to permit any male callers to their rooms at any time; and the fact of the District Attorney's statement, in the presence of the jury, that the girls had received male callers in their rooms, led the jury to convict the defendant by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause.

XXVII

The Court erred, as a matter of law, in denying the defendant's motion for a new trial, to which ruling the exception of the defendant was duly taken and allowed.

XXVIII

The Court erred, as a matter of law, in denying the defendant's Motion in Arrest of Judgment, to which

ruling the exception of the defendant was duly taken and allowed.

Earl Rogers
Chas Scholz
Milton M Cohen

Attorneys for Defendant.

And, upon the foregoing Assignment of Errors and upon the record in said cause, the defendant prays that the verdict and judgment rendered therein may be reversed.

Dated this —— day of June, 1917.

Earl Rogers
Chas Scholz
Milton M. Cohen

Attorneys for Defendant.

We hereby certify that the foregoing Assignment of Errors are made in behalf of the petitioner, for Writ of Error, and are, in our opinion, and the same now constitute the assignment of errors upon the Writ prayed for.

Earl Rogers
Chas Scholz
Milton M. Cohen

Attorneys for Defendant.

[Endorsed]: Original. No. 1176 Crim. U. S. District Court, in and for the Southern District of California, Southern Division, United States of America, Plaintiff, vs. Warren Fabian, Dan Malone and Frank Beyer, Defendants. Assignment of Errors. (Frank Beyer.) Received copy of the within this 19 day of June, 1917. W. F. Palmer, Asst. U. S. Atty. Filed Jun 19, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore. deputy clerk. Earl Rogers, Charles

Scholz & Milton M. Cohen, 403 California Building.
Phone Broadway 2626, Los Angeles, Cal., Attorneys
for Defendants.

*In the District Court of the United States for the
Southern District of California Southern Division*

UNITED STATES OF AMERICA,

Plaintiff,

v.

WARREN FABIAN, DAN MALONE, and FRANK
BEYER,

Defendants.

No. 1176, Criminal

ORDER ALLOWING WRIT OF ERROR.

Upon motion of Earl Rogers, Charles Scholz and Milton M. Cohen, Esqs., attorneys for the defendant Frank Beyer, and upon filing the petition for a Writ of Error and Assignment of Errors, it is

ORDERED, that a Writ of Error be and hereby is, allowed, to have reviewed, in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore made and entered herein; that, pending the decision upon said Writ of Error, the supersedeas prayed for by the defendant, in his petition for writ of error herein, is hereby allowed, and the defendant Frank Beyer be admitted to bail upon said writ of error in the sum of Two Thousand Dollars.

Dated this 19th day of June, 1917, at Los Angeles, California.

Oscar A Trippet,
Judge of the District Court.

[Endorsed]: No. 1176, Crim. IN THE United States District Court, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA Southern Division UNITED STATES OF AMERICA Plaintiff vs. WARREN FABIAN, DAN MALONE and FRANK BEYER, Defendants. ORDER ALLOWING WRIT OF ERROR. FILED JUN 19 1917 WM. M. VAN DYKE, Clerk By Geo. W. Fenimore Deputy Clerk Received copy of the within order this 19 day of June 1917. W. F. Palmer, Asst. U. S. Atty. EARL ROGERS Charles Scholz & Milton M. Cohen, 403 CALIFORNIA BUILDING Phone Broadway 2626 Los Angeles, Cal. Attorneys for defendant Frank Beyer,

In the United States Circuit Court of Appeals for the Ninth Circuit.

F. B. BEYER,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**ORDER EXTENDING TIME TO PRESENT
AND FILE BILL OF EXCEPTIONS.**

Good cause appearing therefor, IT IS HEREBY ORDERED, that the time within which the Plaintiff in Error in the above entitled cause may present and file the Bill of Exceptions in the United States Circuit Court of Appeals for the Ninth Circuit, be and

the same hereby is extended to and including the 17th day of July, 1917.

Dated at Los Angeles, California, July 9th, 1917.

Trippet

United States District Judge.

OK.

Schoonover

[Endorsed]: No. 1176. Criminal. In the United States Circuit Court in and for the Southern District of California, Southern Division, United States of America, Defendant, vs. F. B. Beyer, plaintiff. Order. Received copy of the within order this 7th day of July, 1917. Albert J. Schoonover. Filed Jul. 9 1917 at 40 min. past 4 o'clock P. M. Wm. M. Van Dyke, Clerk Murray C. White, Deputy. Earl Rogers, 403 California Building. Phone Broadway 2626, Los Angeles, Cal.

*In the District Court of the United States for the
Southern District of California Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff

v

FRANK BEYER,

Defendant.

**ORDER EXTENDING TIME TO PRESENT
AND FILE PROPOSED BILL OF EXCEP-
TIONS.**

Good cause appearing therefor, IT IS HEREBY ORDERED, That the time within which the defendant in the above entitled cause may present and file his

proposed Bill of Exceptions in the above Court, be and the same hereby is extended to and including the 15th day of August, 1917.

Dated at Los Angeles, California, July 18th, 1917.

Trippet

United States District Judge.

[Endorsed]: No. 1176 IN THE United States District Court IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA Southern Division United States of America Plaintiff vs. Frank Beyer, et al. Defendant Order FILED JUL 18 1917 at 5 min. past 3 o'clock P. M. Wm. M. VAN DYKE, Clerk Geo. W. Fenimore. EARL ROGERS and Milton M. Cohen- 403 CALIFORNIA BUILDING PHONE BROADWAY 2626 LOS ANGELES, CAL. Attorneys for defendant.

In the District Court of the United States for the Southern District of California Southern Division

UNITED STATES OF AMERICA,

Plaintiff

v.

FRANK BEYER,

Defendant.

ORDER EXTENDING TIME.

Good cause appearing it is hereby ordered that the defendant, Frank Beyer, have to and including the 10th day of September 1917 in which to present and file his proposed bill of exceptions in the above case.

Dated at Los Angeles, California, this 13th day of August, 1917.

Bledsoe

U. S. District Judge.

The above order is stipulated to by

Robert O'Connor

Asst U. S. District Attorney.

So Ordered

Bledsoe Judge.

8/13/17

[Endorsed]: Original No. 1176 IN THE United States District Court IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA Southern Division United States of America Plaintiff vs. Frank Beyer Defendant Order Extending Time FILED AUG 13 1917 at — min. past — o'clock — m. Wm. M. VAN DYKE, Clerk T F Green Deputy EARL ROGERS and Milton M. Cohen 403 CALIFORNIA BUILDING PHONE BROADWAY 2626 LOS ANGELES, CAL. Attorneys for Defendant.

In the District Court of the United States for the Southern District of California Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

v.

WARREN FABIAN, DAN MALONE,
and FRANK BEYER,

Defendants.

No. 1176, Crim.

PRECIPE.

TO THE CLERK OF THE SAID COURT, SIR:

Please issue a certified transcript of the following

matters and documents or copies thereof, including endorsements, upon Writ of Error, to the United States District Court for the Southern District of California, Southern Division, towit:

1. Indictment,
2. Arraignment and plea of defendant,
3. Demurrer,
4. Order overruling demurrer,
5. Minutes of trial,
6. Verdict (recorded)
7. Verdict (filed)
8. Orders denying motions for a new trial and in arrest of judgment, and minutes and orders of proceedings had on June 18, 1917.
9. Sentence and judgment of the Court,
10. Petition for Writ of Error,
11. Assignment of Errors,
12. Order allowing Writ of Error,
13. Supersedeas bond of defendant.
14. Writ of Error.
15. Citation to the United States of America on Writ of Error.
16. Certificate of Clerk of the United States District Court to Record.
17. Bill of Exceptions.
18. Precipe.
19. Stipulations extending time to file bill of exceptions.

Earl Rogers and
Milton M Cohen
Attorneys for Defendant.

[Endorsed]: No. 1176, Crim. In the United States District Court, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Warren Fabian, Dan Malone and Frank Beyer, Defendant. Precipe (Frank Beyer). Received copy of the within this 5th day of Dec., 1917. W. F. Palmer, Asst. U. S. Atty. Filed Dec. 5, 1917, at 5 min. past 4 o'clock P. M. Wm. M. Van Dyke, clerk; Murray C. White, deputy. Earl Rogers, Charles Scholz & Milton M. Cohen, 403 California Building, Phone Broadway 2626, Los Angeles, Cal., Attorneys for defendants.

*In the District Court of the United States for the
Southern District of California Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

v.

WARREN FABIAN, DAN MALONE, and FRANK
BEYER,

Defendants.

No. 1176, Crim.

BOND PENDING DECISION UPON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, that we, Frank Beyer, of the County of Imperial, State of California, as principal, and The Aetna Casualty and Surety Company, as surety, are jointly and severally held and formally bound unto the United States of America, to the full and just sum of Two thousand (\$2000.00) dollars, to be paid to the said United States

of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 19th day of June, in the year of our Lord, nineteen hundred and seventeen.

Frank Beyer

Seal

(Seal) The Aetna Casualty and Surety Company
By Fred W Weitzel

Attorney in fact

WHEREAS lately, at a term of the District Court of the United States, Southern District of California, Southern Division, in a suit pending in said Court, between the United States of America, plaintiff, and Frank Beyer, defendant, a judgment and sentence were made, given and rendered against said Frank Beyer, and the said Frank Beyer having obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a Citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, pursuant to the terms, and at the time fixed, in the said Citation, which said Citation has been duly served, and,

WHEREAS the said Frank Beyer has been admitted to bail, pending decision upon said Writ of Error, in the sum of Two thousand (\$2000.00) dollars.

NOW, THEREFORE, the condition of the above obligation is such, that, if the said Frank Beyer shall appear, either in person or by his attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day, or days, as may be appointed for the hearing of said cause in the said Court, and prosecute his Writ of Error, and, if the said Frank Beyer, shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit; and, if the said Frank Beyer shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day, or days, as may be appointed for the re-trial by said District Court, if the judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and, if the said Frank Beyer shall surrender himself in execution of the judgment and sentence aforesaid, if the said judgment and sentence against him be affirmed by the said Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise, to remain in full force, virtue and effect.

Frank Beyer

Principal

(Seal) The Aetna Casualty and Surety Company

By Fred W Weitzel

Attorney-in-fact

Surety.

Signed, sealed and acknowledged by the principal
this 19th day of June, 1917.

Signed, sealed and acknowledged by the surety this
19 day of June, 1917.

[Endorsed]: Original No. 1176 Crim IN THE United States District Court IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA Southern Division UNITED STATES OF AMERICA, Plaintiff vs WARREN FABIAN, DAN MALONE and FRANK BEYER Defendants BOND PENDING DECISION UPON WRIT OF ERROR. (Frank Beyer) FILED JUL 19 1917 Wm M. VAN DYKE, Clerk By Geo. W. Fenimore Deputy Clerk EARL ROGERS Charles Scholz and Milton M. Cohen 403 CALIFORNIA BUILDING PHONE BROADWAY 2626 LOS ANGELES, CAL. Attorneys for defendants

No. 3106.

United States
Circuit Court of Appeals, 7
FOR THE NINTH CIRCUIT.

Frank Beyer,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
United States of America,	
<i>Defendant in Error.</i>	

BRIEF OF PLAINTIFF IN ERROR

EARL ROGERS,
MILTON M. COHEN,
JEROME KAHN,
O. G. KUKLINSKI,
Attorneys for Plaintiff in Error.

No. 3106.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Frank Beyer,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
United States of America,	}
<i>Defendant in Error.</i>	

BRIEF OF PLAINTIFF IN ERROR

The plaintiff in error, hereinafter called the defendant, was jointly with certain other defendants, indicted and convicted under section 2 of the Act of Congress of June 25th, 1910, commonly referred to as "The White Slave Traffic Act."

The section of this act, so far as pertinent to the case at bar, reads as follows:

"Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce or foreign commerce * * * any

woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice; or who shall knowingly procure or obtain, or aid or assist in procuring or obtaining any ticket or tickets, or any form of transportation or evidence of the right thereto to be used by any woman or girl in interstate or foreign commerce * * * in going to any place for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to the practice of debauchery, or any other immoral purpose, whereby any such woman or girl shall be transported in interstate or foreign commerce * * * shall be deemed guilty"—of the crime prescribed in said section, and shall be punished accordingly.

I.

Where the Definition of the Offense Created by a Statute Includes Generic Terms, It Is Not Sufficient to Charge the Offense in the Language of the Statute, but It Is Essential That the Indictment Descend to Particulars and Specify the Acts Which Bring the Defendant Within the Purview of the Statute.

The defendants in the case at bar were not charged with transporting, or causing to be transported, women and girls for the purpose of prostitution, which term

has a clearly defined and generally understood meaning. But the indictment is founded upon that part of the above quoted section which, in defining the offense denounced therein, employs the terms “debauchery” and “any other immoral purpose.” These words have no technical meaning, but are generic terms, embracing a large class of cases which it was not the intention of Congress to embrace in the statute, and which, indeed, do not constitute any criminal offense at all.

In *Gillette v. United States*, 236 Fed. 215, the Circuit Court of Appeals for the Eighth Circuit says in regard thereto on page 218:

“The word debauch is a word of broad signification. It includes all kinds of excessive indulgences in sensual pleasures of any kind, such as gluttony and intemperance.”

In *Athanasaw v. United States*, 227 U. S. 326, the Supreme Court of the United States defines the scope of the term “debauch” in the following language, on page 331:

“The term debauch is not a legal or technical term. (Italics ours.) To debauch is to corrupt in morals or principle; to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery then, is an excessive indulgence of the body, licentiousness, drunkenness, corruption of innocence, taking up vicious habits.”

The wide range of the words “any other immoral purpose” is apparent from the words themselves.

The rule of criminal pleading is well established that, whenever a statute in defining an offense uses generic

terms, it is not sufficient to charge the offense in the language of the statute, but the indictment must set forth the specific acts which are claimed to bring the defendant within the purview of the statute. The reason for this rule is obvious. A charge in the language of the statute, using generic terms, is not definite and certain enough to enable the court to determine whether or not the acts charged constitute the crime contemplated and denounced by the statute. Nor could the defendant, under such a charge, know what specific accusation he is called upon to meet. In *United States v. Cruikshank*, 92 U. S. 542, the Supreme Court of the United States, on page 559, says:

“In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right ‘to be informed of the nature and cause of the accusation.’ Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and in *United States v. Cook*, 17 Wall. 174, that ‘every ingredient of which the offense is composed must be accurately and clearly alleged.’ It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms, as in the definition, but it must state the species, it must descend to particulars. 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable

him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

In *People v. Perals*, 141 Cal. 581, the Supreme Court of California, at pages 582-3, says in regard thereto:

"While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification, that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words, which have a well-recognized meaning, or designates and specifies particular acts or means whereby an offense may be committed.

Under such circumstances, to charge the offense substantially in the language of the statute will be sufficient.

When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced in the general language of

the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted."

II.

The Acts Charged in the Indictment Do Not Bring the Defendant Within the Meaning of the Statute Upon Which the Indictment Is Founded, and Are Neither Within Its Letter Nor Spirit.

After charging the defendants with knowingly transporting and causing to be transported in foreign commerce certain women and girls for the purpose mentioned in the said section of the statute, the indictment proceeds to state the particular acts of which the defendants are accused, as follows:

"For the purpose of acting as entertainers and chorus girls, that is to say, singing and dancing in a certain building in Mexicali, in the Republic of Mexico, which said building would be known as the Owl Cafe, and the ground floor of said building where said women and girls would act as entertainers and chorus girls, as aforesaid, would consist of one large room with a certain space set aside for a gambling hall and a certain space set aside for a bar where intoxicating liquors would be sold, and a certain space set aside for tables and chairs where intoxicating liquors would be drunk,

and leading off from said ground floor of said building there would be two hallways on either side of which said hallways there would be small rooms commonly termed cribs, where various and sundry other women and girls, whose names are to the grand jurors unknown, would engage in the practice of prostitution, that is to say, would engage in sexual intercourse with men other than their husbands, and it would be a part of the duties of said women and girls aforesaid whom the said defendants so conspired to transport as aforesaid as entertainers in said Owl Cafe to sell intoxicating liquors to any and all persons who might desire to buy them, and said women and girls would receive a percentage of forty (40%) per cent on all such intoxicating liquors which they might sell, and to dance with any and all persons who might want to dance with said women and girls, and the women and girls so conspired to be transported as aforesaid, were to entertain and perform as such chorus girls in that part of said building set apart as aforesaid for the bar and gambling tables, and to there perform and entertain in the place, and said girls were to solicit persons in said place, other than the inmates thereof, to buy and drink liquors with the said chorus girls, such liquors to be drunk at the tables provided in said place for said purpose and said girls were to so solicit any and all persons coming into said place to so buy and drink liquor, and said solicitation was to be in the presence of any and all persons there at the time of said solicitation, and in the presence of the said women then and there engaged in prostitution while said prostitutes were in

said part of said place; and the said prostitutes would solicit in the place where said chorus girls were to be, and in their presence, men to go with said prostitutes to said cribs; and said prostitutes and inmates of said place would frequent said compartment thereof in which said chorus girls were to be and entertain, and there would drink intoxicating liquors and procure sales of intoxicating liquors to men congregated there, all in the place where said chorus girls were to so entertain and solicit and stay; and said place would be frequented at all hours of the day and night by men of low character who would congregate there for the purpose of indulgence in intoxicating liquors; and dancing and for the purpose of prostitution; and said chorus girls were to occupy said place and be exposed at all times when in the performance of their said duties there to the company and contact of all said men, and all said prostitutes who would be there congregated."

Independent of the fact that the government did not substantiate by any evidence the essential acts charged therein, as will be more fully discussed hereafter, the indictment utterly fails to disclose any act of commission denounced by the statute. There is no allegation of any act of debauchery or sexual immorality committed by the women or girls alleged to have been transported or of any act of defendants which caused the women and girls transported by the defendant, as alleged, to commit any act of debauchery or other immoral act within the meaning of the statute. Nor is there any allegation that the defendant intended that the acts set out in the indictment should bring about the commission of such acts.

It is established, beyond all doubt, by the decisions of the federal courts, construing the Act of June 25th, 1910, that the words "debauch" and "immoral purposes" refer only to such acts as belong to the same kind and class as are designated by the word prostitution, namely, sexual immorality.

In *Suslak v. United States*, 213 Fed. 913, the Circuit Court of Appeals for the Ninth Circuit, defining the word debauchery, says on page 917:

"In the Century Dictionary debauchery is defined as:

'Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust.'

So Webster, while giving one of the meanings, seduction from virtue, duty, or allegiance, also defines the term as:

"Excessive indulgence of the appetites, especially indulgence of lust; intemperance, sensuality; habitual lewdness.'

It was in this sense of unlawful indulgence of lust in which the term was intended to be used in the act."

In *Athanasaw v. United States*, 227 U. S. 326, it is said on page 331:

"The term debauchery, as used in this statute, has an idea of sexual immorality."

And in *Gillette v. United States*, 236 Fed. 215, the court says, on page 218, that the word "debauchery" "is used in the statute with reference to immoral sexual relations."

The meaning of the words "immoral purposes" is clearly defined by the Supreme Court of the United States in *Caminetti v. United States*, 242 U. S. 470. The court in that case quotes from *United States v. Bitty*, 208 U. S. 393, at pages 486-7, the following language:

"All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.' *Murphy v. Ramsey*, 114 U. S. 15, 45. * * * Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for the purpose of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of

importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of *ejusdem generis* the immoral purpose referred to by the words 'any other immoral purpose,' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland Stat. Const., par. 423, and authorities cited."

And the Supreme Court of the United States adds thereto:

"This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and must be presumed to have been known to Congress when it enacted the law here involved."

The allegations of the indictment, as quoted above, fall short of stating the essential elements of the offense defined by the statute.

They disclose merely an employment of certain women and girls as entertainers in a cafe, frequented also by prostitutes, and omit to charge that the women and girls were transported for the purpose of committing acts in violation of the White Slave Act. If it was intended to charge the defendants with the consummation of the crime, the facts alleged in the indictment are not sufficient to constitute a violation of the statute without an allegation that acts of debauchery or sexual immorality had been actually committed by the persons transported. In such instance the law might infer therefrom that the defendants intended that the transportation should have that effect. But such inference, as a matter of law, can be made

only if the crime charged had been consummated. The indictment, therefore, under such circumstances, necessarily must set forth the ultimate fact, the essential fact, namely, the consummation of the crime charged.

If, on the other hand, it was intended to charge defendants with an attempt to commit the crime contemplated by the statute, then it must be specifically averred in the indictment that the defendants did the acts set forth in the indictment with the intent to cause the women and girls transported to commit acts of sexual immorality. Without an allegation of such specific intent no crime can be charged, where the acts of debauchery and sexual immorality have in fact not taken place.

We perceive that it was the intention of the prosecution to charge the defendants in the case at bar, not with the consummation of a crime under the White Slave Act, but relying upon the Athanasaw case, reported in 227 U. S. 326, to charge them with an attempt to commit such crime. But in the Athanasaw case (*supra*) the intent to debauch the person transported was expressly charged, and the court in its instructions emphatically stated that the intent of the defendants at the time of the furnishing of the transportation was the very essence of the charge.

It is said in that case on page 330:

“The intent and purpose of the defendants at the time of the furnishing of this transportation * * * is the very gist and question of this case. Did they intend to induce, or entice, or influence her to give herself up to debauchery? * * * The question here is of intent; what was the intent with which they brought her; * * *?”

It certainly cannot be said that because the employment of women and girls as entertainers might lead some women and girls astray, in the sense of sexual immorality, the defendants, regardless of the fact that they had no intent to bring about such a condition, are guilty of the offense denounced by the White Slave Act.

This act does not and cannot concern itself with the restriction of the employment of women and girls in lawful pursuits, but is intended to prevent persons from transporting and employing women and girls with the specific intent to corrupt their morals in a sexual sense. The intent, therefore, is an essential ingredient of the offense, and must be alleged, and proven as alleged.

The indictment, in the case at bar, is devoid of any allegation of specific intent. It is alleged therein that certain women and girls were transported by the defendants for the purpose of "debauchery" and "other immoral purposes." And this purpose as described in the indictment shows nothing more and nothing else than an employment for a legitimate purpose, to act as entertainers. It nowhere appears from the indictment that there was any intent on the part of the defendants to induce or persuade thereby the women and girls, alleged to have been transported by them, to commit any act of sexual immorality.

It requires no citation of authorities to show that an indictment must contain a complete, certain and definite charge, and where an attempt to commit a crime is sought to be charged it is essential to set out the specific intent and to state facts showing the intent as a matter of law, as more particularly discussed be-

low. A person cannot be charged with a felony by setting forth facts showing the pursuit of a lawful occupation in the expectation that, perchance, a jury may be found which would regard those facts as sufficient to find the defendant guilty of the crime attempted to be charged. It seems needless to pursue this argument further. The indictment in the case at bar does not state an offense under the Act of Congress of June 25th, 1910, and the demurrer of the defendants, interposed to the indictment, should have been sustained.

III.

The Proof Presented by the Prosecution in Support of the Allegations of the Indictment Substantially Varies Therefrom to Such a Degree That They Remain Entirely Unsupported by Any Evidence. The Motion in Arrest of Judgment, Interposed by the Defendants, After Verdict, Therefore, Should Have Been Granted.

The essential allegations of the indictment, describing the offense, specify the purposes for which such women and girls were transported by the defendants, as follows:

“Said girls were to solicit persons in said place, other than the inmates thereof, to buy and drink liquors with said chorus girls, such liquors to be drunk at tables provided in said place for said purpose, and said girls were to so solicit any and all persons coming into said place to so buy and drink liquor and said solicitation was to be in the presence of any and all persons

there at the time of said solicitation, and in the presence of said women then and there engaged in prostitution while said prostitutes were in said part of said place; * * * and said chorus girls were to occupy said place and be exposed at all times when in the performance of their said duties there to the company and contact of all said men, and all said prostitutes who would be there congregated.”

The evidence produced by the prosecution not only did not establish that the girls in question solicited persons to buy liquor, but, on the contrary, the evidence conclusively shows that the said girls never asked any one to buy liquor.

Sally Margaret Claxton, a witness called on behalf of the prosecution, testified on her direct examination, in that regard, at page 68 of the transcript of the record, as follows:

“Q. If any men asked you to dance, you would dance with them?

A. Yes, sir.

Q. What, if anything, was done in regard to having the men drink?

A. There wasn't anything done. They danced, and then they went over to a table and sat down.

Q. Would the girls ask them to drink?

A. No, sir.”

And the same witness testified, at pages 100-101 of the transcript of the record, as follows [Tr. p. 122]:

“Q. At any time did you ask any man to drink with you while you were there?

A. No, sir.

Q. I will ask you if you asked any man to buy liquor for you? Did you ever do that?

A. No, sir.

Q. You never asked any man to buy any liquor for you at all?

A. No, sir."

Alma Person, a witness introduced on behalf of the prosecution, gave the following testimony in regard thereto, at page 117 of the transcript of the record [Tr. p. 170]:

"Q. By Mr. Palmer: Now when you were dancing, was any effort made—did you make any effort to sell liquors?

A. No, sir.

Q. Did you ever ask any man to buy drinks?

A. No, sir."

So, too, the allegation that the girls in question were at all times exposed to the company and contact of the prostitutes, who would congregate in the cafe, is utterly disproved by the evidence presented in behalf of the prosecution. Alma Person, a witness for the prosecution, testified as follows at page 122 of the transcript of the record:

"Q. Did the girls have separate tables, the chorus girls and these other women?

A. The chorus girls never sat with any of the other women."

And at pages 122 and 123 of the transcript of the record, the same witness testified as follows:

“Q. By Mr. Palmer: Was there any rule of the house that provided that the women who came from the rear of the house should not sit at the same table with the girls who were in the chorus? * * *

A. We were not allowed to even talk to them, to the other women.

Mr. Palmer: Just read the question.

(Question read.)

A. Yes, sir, that was the rule.

Q. That was the rule?

A. Yes, sir.”

And on page 129 of the transcript of the record the same witness, Alma Person, testified as follows [Tr. p. 199]:

“Q. During any of your employment down there, we will say at the old place—I will pick that out—did you in any wise associate with or talk with, eat at the same table with, or drink at the same table with any prostitute?

A. No, sir.

Q. Did any of these women whom counsel is calling prostitutes—were any of these women speaking to you, did they speak to you or talk to you in any way?

A. No, sir.”

Grace Covert, a witness called on and in behalf of the prosecution, testified on the same issue, at page 148 of the transcript of the record, as follows:

“Q. Now with respect to these women that you were told were there, those prostitutes; at any time did you hold any conversation with any of them?

A. No, sir.

Q. Did you at any time sit down at a table with any of them?

A. No, sir.

[Tr. p. 245]: Q. Or did any of them approach you in any way?

A. No, sir."

There is thus no evidence whatever to sustain the allegations above quoted, and the proof introduced by the prosecution constitutes a material variance from the charge alleged in the indictment. The allegations of exposing the girls in question to contact with prostitutes and compelling them to solicit persons to buy liquor, constitute the main averments upon which the accusation of the defendants' violation of the White Slave Act is based. The other allegations contained in the indictment merely set forth the fact that the girls in question were employed in the cafe of the defendants as entertainers. It is evident that the prosecution having utterly failed to substantiate the charges as laid in the indictment, the variance between the allegations and the proof amounting to a complete failure of proof were material. It was error, therefore, to deny the motion in arrest of judgment.

IV.

The Court Erred in Instructing the Jury in Reference to the Intent and the Proof Required in Order to Establish a Violation of the White Slave Act.

The court charged the jury as follows [Tr. of Record, p. 178]:

“The conspiracy must have involved an intent to violate said act above referred to as the White Slave Act; that is to say, that the defendant intended that the women which they would transport, if any, should be placed in a situation as described in the indictment and hereafter referred to.”

And the court further instructed the jury, on page 186 of the transcript of the record, in the following language:

“If the defendants took them into surroundings and environment that would naturally lead to debauchery as aforesaid, then the law is that the defendants intended the natural and necessary consequences of their act.”

The White Slave Act is aimed to punish the transportation of women and girls in interstate commerce for the purpose of prostitution or debauchery or for any other immoral purpose within the meaning of the statute, that is to say, for the purpose of practicing sexual immorality. No matter how far the application of this statute might be extended by judicial interpretation, it cannot be applied to cases which are beyond the express terms of the legislative enactment.

The court charged the jury that the statute is violated if the defendants intended to place the women alleged to have been transported by them in a situation as described in the indictment. The indictment describes merely the nature and place of employment for which the women in question are alleged to have been transported. It is not charged in the indictment that those women, being so situated, committed any act of prostitution, debauchery or sexual immorality.

Nor is it charged in the indictment that the defendants persuaded or induced those women to commit such acts. In other words, the court charged the jury that in spite of the terms of the statute, the White Slave Act is violated where no immoral act denounced by the statute has been committed and that a criminal intent might be inferred from employing women and girls in surroundings which might, perhaps, lead to the commission of sexual immorality, or as the court said, which would naturally lead to debauchery.

The principle of law that a man is presumed to have intended the natural consequences of his act is applicable only to cases in which the crime has been consummated and the acts constituting such crime have been in fact accomplished. The law presumes from the accomplished fact that the accused intended that such fact should occur. But, where the crime has not been consummated there is no basis from which the criminal intent can be inferred. The specific criminal intent is the very essence of an attempt to commit a crime and without it the act is not within the scope of any criminal statute. Indeed, an attempt to commit a criminal offense is an effort to carry out a distinctly formed intent. It is an effort to commit a crime by doing some act towards it with the express intent to consummate the crime, but falling short in its accomplishment.

The distinction between an accomplished crime and an attempt to commit a crime, so far as the determination of guilt depending on the presence or absence of a criminal intent is concerned, has been clearly

stated by the courts whenever this particular question was presented to them. In *Commonwealth v. Hersey*, 2 Allen (Mass.) 173, the Supreme Court of Massachusetts says, on page 180:

“The true distinction seems to be this—when by the common law or by the provision of a statute, a particular intention is essential to an offense or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctiveness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely * * * in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed.”

In *People v. Moran*, 123 N. Y. 254, the Supreme Court of New York, on page 257, says:

“Wherever the *animo furandi* exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. The question whether an attempt to commit a crime has been made is determinable by the *condition of the actor's mind* and his conduct in the attempted consummation of his design.”

In the case at bar the consummation of the crime denounced by the White Slave Act was not charged or proven. The indictment manifestly was designed to charge an attempt to violate the act.

Under the instruction of the court above quoted the jury could not help believing and finding that all that is necessary to establish a violation of the White Slave

Act was the proof of the transportation of women and girls in interstate commerce in order to place them in a certain environment without intent, on the part of the defendants, that the environment should cause them to commit acts of sexual immorality and all that the jury is to determine is whether or not the defendants employed the girls in such environment and that it is not necessary to establish the intent of the defendants that acts of sexual immorality should have been committed by the women and girls transported, but that the law presumes the intent.

The learned judge presiding at the trial of this cause probably had in mind the decision rendered in the case of *Athanasaw v. United States*, 227 U. S. 326, while charging the jury that in order to find the accused guilty under the White Slave Act, it is not necessary that the intended acts of sexual immorality should have been, in fact, committed. But, in the *Athanasaw* case (*supra*), the court distinctly and emphatically charged the jury that the intent is the very essence of the offense where the acts of debauchery, though intended by the defendants, have not actually been accomplished. The court says there:

“The intent and purpose of the defendants at the time of the furnishing of this transportation for Agnes Couch is the very gist and question of this case. Did they intend to induce or entice or influence her to give herself up to debauchery?
* * * The question here is of intent; what was the intent with which they brought her; that she should live an honest, moral and proper life? or that she came and they engaged and contracted with her for the purpose of her entering upon a

condition which might be termed debauchery, or tends to or would necessarily and naturally lead her to a condition of debauchery just referred to?"

Furthermore, in the Athanasaw case, the defendant was not only charged with a specific intent to induce the girl transported by him to commit acts of debauchery, but his intent to do so and the acts committed by him which tended to bring about such debauchery were affirmatively established by the proof. Notwithstanding these facts, which clearly distinguish the Athanasaw case from the case at bar, the court in that case not only did not tell the jury that the intent may be inferred from the acts committed by the defendant, but expressly explained to the jury that the intent must be established, that the intent is the gist of the offense, and that the defendant, if he did not have the specific criminal intent, could not be found guilty.

It is apparent that under the instructions of the court in the case at bar, above quoted, the determination of the guilt of a person accused under the White Slave Act does not rest upon definite rules of law but upon a vague and indefinite calculation whether a certain environment in which a woman or girl is placed might lead her to sexual immorality. The White Slave Act, however, is a penal statute, having a clearly defined scope which must be strictly followed and considered in order to ascertain whether the statute had been violated. The fact of such violation cannot be left to conjecture or inferences of fact, but is limited to those immoral acts which are denounced by the statute.

V.

The Court Erred in Its Instructions by Omitting to Separate the Law From the Facts Upon Which the Court Expressed Its Opinion to the Jury.

The privilege of the federal judges to express their opinions upon the evidence of the case does not go as far as to authorize an expression of opinion which, coupled with a statement of the law, may mislead the jury in believing that they are bound by the opinion expressed by the court, as to certain facts in evidence.

The Supreme Court of the United States in *Starr v. United States*, 153 U. S. 614, says in regard thereto on pages 624, 625 and 626:

“It is true that in the federal courts the rule that obtains is similar to that in the English courts and the presiding judge may, if in his discretion he thinks proper, sum up the facts to the jury. * * * But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar providence. *McLanahan v. Universal Insurance Co.*, 1 Pet. 170, 182. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed but as mere opinion as to the facts to which they should give no more weight than it was entitled to. * * * It is obvious that under any system of jury trials the influence of the trial judge on the

jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling.”

The rule as expressed by the Supreme Court of the United States is to be observed with particular strictness in those circuits in which the judges of the state courts are not empowered to comment on the evidence in their instructions to the jury.

It is said in *Foster v. United States*, 188 Fed. 305, on page 310:

“It should be borne in mind that the judge of the various state courts are not permitted to express an opinion as to the weight of the testimony, nor are they permitted to express an opinion as to the guilt of a defendant. Our people have become accustomed to this system, and as a consequence jurors attach great importance to any expression coming from the presiding judge, feeling, as they do, that it is only in exceptional cases that he expresses an opinion as to any matters that may be submitted to them, and when he does they feel that they are bound by the same.

Under these circumstances an expression of opinion from a federal judge necessarily carries more weight than the opinion of a federal judge in a circuit where a different rule prevails in the state courts. While the learned judge who heard this case below employed language that clearly informed the jury that they were not bound by any expression that he may have made, nevertheless the circumstances surrounding the trial of this case are such as to impel us to the conclusion that the jury was influenced in a large measure by the

opinion of the court. * * * Notwithstanding the trial judge may express an opinion as to the weight of the evidence * * * in criminal cases, the greatest caution should be used in the exercise of his power, and the jury should be left free and untrammelled in the determination of questions of fact which are to be passed upon by them."

And it has been held that an error in expressing an opinion on a matter of evidence, coupled with a statement of law, is not cured by a disclaimer on the part of the judge in his charge that he has no intention to control the jury by expression of his opinion.

Sandal v. United States, 213 Fed. 569.

In the case at bar the court charged the jury in the following language, pages 180 and 181 of the transcript of the record:

"If the defendants took them into surroundings and an environment that would naturally lead to debauchery as aforesaid, then the law is that the defendants intended the natural and necessary consequences of their act.

If the defendants contracted with the women that they took there, to the effect that said women should not become prostitutes, or engage in prostitution, or if they advised the women what to do in the event they were solicited by men to sexual indulgence, or otherwise approached concerning debauchery; if the defendant guarded and protected said women against being approached concerning debauchery or indulgence in debauchery, to my mind that would be very strong evidence that the defendants knew that the surroundings

and environment in which said women were to be placed would naturally lead to debauchery and immoral sexual relations.”

And the disclaimer of invading the province of the jury was expressed by the judge presiding at the trial of this cause in the following words:

“In this instruction I propose to comment to some extent, upon the evidence introduced here, and I tell you that you are not bound by what I shall say concerning the weight to be given to the evidence, nor bound by what I may say that it proves. You must determine that for yourselves. Your right, however, to determine the weight of the evidence and the credibility of the witnesses is not arbitrary, but must be exercised *with legal discretion*.”

It seems manifest that the qualified disclaimer of the court in the case at bar did not cure the error in the construction. The jury was told to pass upon the evidence with a legal discretion, a discretion which the jury can hardly be said to possess, and this statement by the court could readily be understood by the jury to mean that they are called upon to decide the cause in accordance with the interpretation and the evidence as given by the judge, learned in the law.

The instruction above quoted contains a charge on the law, coupled with an expression of opinion on the part of the court, which must have, and undoubtedly did have, the effect upon the jury to mislead them in the belief that the legal conception of the evidence referred to by the court is such as stated in the court's charge, and that, therefore, the jury which must pass

on the evidence as they were told by the court, with legal discretion, is bound to follow the opinion of the court and accept it as their own.

In addition thereto the court in the first sentence of the quoted instruction told the jury that it is the law that if the defendants took the girls in question into surroundings which would naturally lead to debauchery they are presumed to have intended the natural and necessary consequences of their act, and in the following sentence the court said that in its opinion the fact that the defendants contracted with the women not to engage in prostitution is very strong evidence that the defendants *knew* that the surroundings in which the women in question were placed would naturally lead to debauchery. These two statements, one of law and the other expressing the opinion of the court, following as they do one another, are confusing and were calculated to mislead the jury in the belief that knowledge in the sense used by the court is, in the eyes of the law, equivalent to the intent to commit the crime charged.

Moreover the court singled out fragments of the evidence on this point without referring to other evidence presented on the same issue which, taken together, negatives the intent on the part of the defendants to induce the women and girls, alleged to have been transported, to commit acts of sexual immorality. The evidence presented by the government itself shows that the defendants, by their acts, those mentioned by the court, as well as others not referred to by the court, not only did not intend to induce those women and girls to debauchery, but made it impossible for

them to commit any act of debauchery or sexual immorality.

Sallie Margaret Claxton, a witness called by and on behalf of the government, testified as follows, at page 84 of the transcript of the record:

“Q. Were you at any time approached or solicited in any way by any of these defendants, or anybody connected with the Owl Cafe?

A. No, sir.

Q. As a matter of fact, you have said you were told if any man said anything to you that you were to say certain things. As a matter of fact, were you told anything about any protection that would be afforded you? What was said about that?

A. I don't just understand you.

Q. Well, I mean to say, state whether or not you were told anything about being furnished with an escort back and forth, or anything of that kind.

A. No, sir; we were just told to tell them not to bother us.”

On page 102 of the transcript of the record the same witness testified as follows:

“Q. Did any of these defendants at any time speak to you about your doing any immoral thing, having any sexual relations with any man?

A. They told us we should never make a date, or anything, with a man.

[Tr. p. 128]: Q. What was said to you with reference to your conduct? What you were to do if any man did, as a matter of fact, make any improper proposals or suggestions to you as respects reporting it?

A. Tell them that we was not there for that purpose, that there was other people.

Q. And you said, however, that no one ever did make any improper proposal to you?

A. No one ever said anything to me."

Alma Person, another witness called by and on behalf of the government, testified, at page 119 of the transcript of the record, as follows:

"Q. Did you receive any instructions from anyone there in regard to men who solicited you, or if any man should solicit you for sexual relations what you should say?

A. Yes, sir.

Q. What were your instructions?

A. We were not allowed to take a walk or make any appointment with any fellows, and if they asked us anything out of the way, we were to tell them we were not there for that purpose.

Q. And what about the others?

Mr. Rogers: I object to that as leading and suggestive, and I don't think it is competent.

Q. By Mr. Palmer: Was there anything further in regard to what you were to say?

A. No, sir."

On cross-examination Alma Person, the same witness, testified, at page 127 of the transcript of the record, as follows:

"Q. What were your instructions concerning meeting or seeing men or having men talk to you, or anything of that sort?

A. We were not allowed to talk or make appointment, or go out on machine ride, or nothing with nobody.

Q. Did anyone solicit you at any time to do any immoral or indiscreet act?

A. No, sir."

The same witness further testified on cross-examination, at page 133 of the transcript of the record, as follows:

"Q. And during all the times that you have been employed there, have you been permitted at any time to associate with any men, have them come to your rooms, make dates with them, as you call it, appointments with them, or anything of that sort?

A. No, sir."

Grace Covert, another witness called by and on behalf of the prosecution, testified, at pages 147 and 148 of the transcript of the record, as follows:

"Q. Now at any time were you told what you were to do if any man made improper proposals to you or propositions to you? I will change that a bit. Were there officers about through the place there, policemen, guards and one thing another?

A. Yes, sir.

Q. Now you may state whether or not you were directed by the management what to do in case any man said anything to you of an improper nature.

A. Just let him know.

Q. Let the officer know?

A. Yes, sir.

Q. Did any man make any proposals to you of an improper nature while you were there?

A. No, sir."

The evidence thus conclusively shows that the defendants not only had no criminal intent, but on the contrary took steps to prevent a violation of the statute. Assuming for the sake of argument that the defendants knew of the possible consequences of the surroundings in which the women and girls were employed, it is nevertheless proven that such knowledge, if any, was taken advantage of by them not to violate the law, but to make a violation thereof impossible. But it seems at least as reasonable to suppose that the terms of the contracts were founded upon the want of knowledge on the part of the defendants of the character of the girls so employed by them rather than upon the knowledge of the surroundings in which they were to work. The effect of surroundings upon the morality of people cannot be, under any circumstances, definitely foreseen. It depends upon the tendencies, the will power, and the habits of the person placed in a certain surrounding. What might be for one person a natural consequence of a certain environment might have a contrary or no effect at all upon another. The law cannot concern itself with probabilities and put the tendencies of persons on a scale and weigh them in order to determine whether a crime has been committed.

A penal statute must be definite in its application. It cannot reach out and accuse any citizen upon the mere conjecture that perhaps he has brought about a

condition which, though it did not lead to the commission of a crime, might have unintentionally effected a violation of the law.

The indictment in the case at bar and the trial of the cause proceeded upon the theory that the placing of women and girls in surroundings and environment which might naturally lead to debauchery, is sufficient to establish the offense denounced by the "White Slave Act." But it is obvious from the foregoing that where acts of sexual immorality have not been committed, without a specific intent of the defendants to bring about a commission of such acts, there can be no violation of the statute, nor a prosecution thereunder.

In the case at bar the criminal intent is neither charged nor proved.

While it is a matter of judicial history that the application of the White Slave Act has been extended beyond the intention of the Congress, it cannot be doubted that the courts will not apply the statute to cases which do not come within its express terms. Nor will the courts in applying the White Slave Act disregard the fundamental principle that in order to convict a person of an attempt to commit a crime denounced by the statute, there must be a specific intent directed toward the violation thereof.

It is earnestly contended that the errors of the court in overruling the demurrer to the indictment and occurring at the trial of the cause should be corrected by this Honorable Court, that the verdict of the jury rendered herein be set aside and that the judgment and sentence of the court pronounced thereon be reversed.

Respectfully submitted,

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No. 3106.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Frank Beyer,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
United States Attorney;

CLYDE R. MOODY,
*Assistant United States Attorney,
Attorneys for Defendant in Error.*



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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

Plaintiff in error has omitted to make a statement of the case to the court in his brief, and in order that the court may more easily comprehend what this case is about, we will make a brief statement of the evidence.

The indictment charges that the plaintiff in error, with certain other defendants, named and unnamed, conspired to transport certain women and girls from the United States to Mexico for the purpose of de-

bauchery, the manner in which said debauchery was to be effected being more fully described in the said indictment.

The evidence, in brief, of the government showed that the defendants were the owners or proprietors of a certain building in Mexicali, Mexico, in which building they were conducting a bar, a gambling hall, a dance hall, a cafe and a house of prostitution. The defendants who were convicted, including the plaintiff in error, were the recipients of the profits of all of the various businesses conducted in the said building. The prosecution, among other witnesses, called several women and girls who were transported from Los Angeles, California, to Mexicali, Mexico, by the defendants, and whom it is alleged the defendants conspired to transport for the purpose of debauchery. From their testimony it developed that during the spring of 1916 the defendants hired them in Los Angeles, California, to go to the institution above described in Mexicali, Mexico, there to act as entertainers in the above described establishment, and the defendants furnished transportation for at least some of these women.

The duties of these entertainers were to sing, dance, appear in a chorus act and to give other theatrical performances; to dance with the male habitués of this place and to sell intoxicating liquors to such habitués, from the sale of which they were to derive a profit of from forty to fifty per cent of the selling price. The witnesses testified that it was optional with them as to whom they might dance with and as to their sale of liquor.

Back of the dance floor was a door leading into a hall, upon both sides of which hall were rooms occupied by prostitutes. The first door leading from the hall was a dressing room used by the entertainers in changing their costumes. The prostitutes were permitted upon the dance floor, in the cafe, at the bar, and other places where the entertainers were. Each of the witnesses for the government was required to sign a contract, which contracts were practically alike, and a copy of which is set out in the transcript at page 155. They were further instructed that in the event any of the male patrons of this establishment should approach them and make improper suggestions to them, they were to say that they were not there for that purpose, but that there were others there, meaning, of course, that there were others there for the purpose of prostitution. [Tr. pp. 83-102-105 and 106.]

One of the witnesses for the Government, Alma Person, was a girl seventeen years old at the time she was taken to Mexicali, Mexico [Tr. 115], and another, Grace Covert, was eighteen years old [Tr. 135].

ARGUMENT.

I.

Point No. 1 argued by plaintiff in error in his brief, to the effect that "Where the definition of the offense created by a statute includes generic terms, it is not sufficient to charge the offense in the language of the statute, but it is essential that the indictment descend to particulars and specify the acts which bring the defendant within the purview of the statute," is suffi-

ciently answered by a careful reading of the indictment in this case and by the case of *Athanasaw v. United States*, 227 U. S. 326. The indictment in the present case charges that the defendants conspired to transport women and girls from the United States to Mexico for the purpose of debauchery, and thereupon proceeds at great length to describe the manner in which the debauchery should take place. An environment is described and certain duties of the women outlined, and the question as to whether this environment and these duties were such that they would naturally lead to the personal sexual debauchery thus suggested to them was one entirely for the jury. The indictment meets the demand of the plaintiff in error that it descends to particulars, et cetera.

The court in the *Athanasaw* case upheld an indictment alleging that the transportation was for "the purpose of debauchery" or "to give herself up to debauchery," and nothing there is said to indicate that the indictment descended to particulars. The court in the course of its opinion said:

"The instructions of the court were justified by the statute. It is true that the court did not give to the word debauchery or to the purpose of the statute the limited definition and extent contended for by defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that some one else should do so. In the view of the court the statute had a more comprehensive prohibition, and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in 'sexual actions.' The general

expressions of the court, however, were qualified to meet and not go beyond the conduct of the defendants. The court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended 'to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually.' That question, the court said, the jury should determine, and further, 'You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendants. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?' "

The court further stated:

"And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover."

From our reading of the Athanasaw case we feel justified in asserting that it is in all particulars as near like the present case as it is possible for one case to be like another. In each instance theatrical people were transported into a questionable environment, and the ability of that environment to accomplish the com-

mon design of the conspirators was rightfully a question which was left to the jury. The essential difference between the Athanasaw case and the case at bar is that in the Athanasaw case the woman was actually solicited to have immoral relations, while in the present case the conspiracy had progressed at the time of the arrest no further than the placing of the woman in the questionable environment. But the description in the indictment of that environment was such that the natural and ordinary consequences of same and the duties required of these women would inevitably result in their becoming subjected to such solicitations and eventually be debauched in the manner contemplated by the statute, namely, "sexually debauched." To use the words of the court in the Athanasaw case, the "efficient school of debauchery of the special immorality contended for" was just such an institution as is described in this indictment.

The indictment may also be sustained from another point of view. These women and girls were transported or placed in this house in Mexicali with another object, to-wit, of making the house as alluring and attractive to the public as possible and to draw as many patrons to the house as possible, particularly male patrons, as such entertainment and duties as these girls were supposed to perform would have small attraction for women patrons. After the male patrons should be so attracted to this place by these entertainers and in a manner become familiar with the various forms of vice therein practiced, it follows that the management intended that they should visit the pros-

titutes, from whom the management derived a portion of its profits. Therefore the women and girls so transported were to become one of the efficient means for maintaining what is perhaps the most offensive form of evil against which the statute is expressly directed. (See *Simpson v. United States*, 245 Federal 278, 280.) These women were therefore assisting, by their actions and presence, the vilest kind of sexual debauchery, and can it be said that one who is procured to attract and entice others into a house of prostitution is not on the road to herself becoming debauched in the most carnal sense? The case of *Simpson v. United States*, *supra*, was one where the woman transported was installed as a mistress in a house of prostitution, but no immoral acts were shown upon her part, yet this court sustained the conviction in this case and the Supreme Court of the United States refused a writ of certiorari to review such case. (U. S. Supreme Court Advance Opinions, 1917, No. 4, page 161.)

II.

Point No. 2, argued by plaintiff in error in his brief, is sufficiently answered by the statement of facts in the case and the argument on point No. 1. The case of *Athanasaw v. United States* and *Simpson v. United States*, *supra*, entirely answer all of the objections raised by plaintiff in error under this point. The only new point argued under this heading is that the indictment did not contain an allegation that the acts set out should bring about the commission of acts of debauchery, but it is plain from the quotations cited above from the *Athanasaw* case that it was only neces-

sary for the jury to determine whether or not the environment would naturally and ordinarily lead to the debauching of the victim. On page 14 of his brief plaintiff in error alleges that it was the intention of the prosecution in this case to charge the defendants, not with the consummation of the crime, but with an intent to commit a crime. Such is an erroneous view of the indictment, as the indictment charges a conspiracy and completes the charge of conspiracy by setting out an overt act. The doctrine is too well settled to admit of argument that the object of a conspiracy need not be successful in order that the crime of conspiracy may be consummated. The indictment sets out that the women and girls were actually placed in the questionable environment, and, according to the Athanasaw case in the quotation above cited, it was not necessary to allege that the defendants intended themselves to debauch the girls or that some one else should do so. Their offense was one of conspiring to place these girls in a position where, in the natural and ordinary course of events, they would become debauched.

III.

Point No. 3 argued by plaintiff in error in his brief purports to cite such instances of variations in the proof from the allegations in the indictment as to warrant the granting of defendant's motion in arrest of judgment. While the indictment does charge that the said girls were to solicit persons in said place and house to buy intoxicating liquors, and the proof does not in so many words conform to such allegations,

nevertheless these allegations are substantially proved, and that is all that is required of any material allegation in an indictment.

The women who testified for the Government each stated that they were to receive forty to fifty per cent on drinks sold by them, and that a material part of their compensation was to be so earned, and they further testified that they did sell drinks to the patrons of the said place and drank at the bar and at tables with them, receiving a per cent on the liquor, and the contract with the women, set out on page 155 of the transcript, mentions the sale by them of liquor and what percentage they were to receive.

While there is no direct testimony as to the actual personal contact with prostitutes, still there is testimony to the effect that the prostitutes were allowed on the dance floor, drank at the tables with the men and at the bar, and frequented the gambling hall. Therefore, there was material proof of the allegation that at all times when in the performance of their said duties these entertainers were to be subjected to the company and contact of the prostitutes.

IV.

In point No. 4 plaintiff in error confuses an indictment charging a conspiracy with an indictment charging the substantive offense. The indictment in this case charged a conspiracy, and the law is well settled that it is not necessary that the object of the conspiracy be successful in order that the conviction of a defendant may stand. In this case the indictment charges that

the defendants conspired to take the women and girls into a certain environment for the purpose of debauchery and then proceeds to describe the environment. If the jury found that this environment was such as would naturally lead to debauchery on the part of the women and girls, then they were justified in their verdict of guilty. The court was therefore right in charging the jury that the law is that the defendants intended the natural and necessary consequences of their act. The gist of the offense was whether or not these natural and necessary consequences of the acts of the defendants would result in the debauchery of the girls. If so, the defendants were guilty, and the presumption of law was properly stated by the court—that the defendants were presumed to intend the natural and necessary consequences of their acts. In the case of *United States v. Pierce*, 245 Federal 878, there is an enlightening discussion upon the intent that may be imputed to defendants from the natural and necessary consequences of their acts.

The instruction complained of is taken almost verbatim from the *Athanasaw* case with the exception of that part of the instruction of the *Athanasaw* case pertaining to intent, and on this subject the plaintiff in error has set out at the top of page 21 of his brief what purports to be the court's instruction as to intent. However, the entire instruction of the court was as follows:

“The conspiracy must have involved an intent to violate said act above referred to as the White Slave Act; that is to say, that the defendants intended that

the women which they would transport, if any, should be placed in a situation as described in the indictment, and hereafter referred to. What was the intent with which the women were to be taken to Mexicali? Was it that they should live an honest, moral and proper life, or were they to be taken to Mexicali for the purpose of entering upon a condition which might be termed debauchery, or which tends to, and which would necessarily and naturally lead them to a condition of debauchery?"

It will therefore readily be seen that the instruction on intent demanded by plaintiff in error was substantially given.

The offense in this case was sufficiently consummated to warrant the instruction of the court complained of, as the women and girls were actually placed in the environment which it then became the duty of the jury to decide was or was not of the character which would lead to the consequences heretofore enumerated. *Athanasaw v. United States, supra.*

V.

The argument of plaintiff in error on this point is directed towards the court's instructing the jury upon a point of fact without immediately calling to their attention that such instruction was not binding upon them. The court instructed the jury as follows:

"In this instruction I propose to comment to some extent upon the evidence introduced here, and I tell you that you are not bound by what I shall say concerning the weight to be given to the evidence, nor

bound by what I may say that it proves. You must determine that for yourselves. Your right, however, to determine the weight of the evidence and the credibility of the witnesses is not arbitrary, but must be exercised with legal discretion.”

Thereafter, in the course of his instructions, he made the following remarks:

“If the defendants contracted with the women that they took there, to the effect that said women should not become prostitutes, or engage in prostitution, or if they advised the women what to do in the event they were solicited by men to sexual indulgence, or otherwise approached concerning debauchery; if the defendant guarded and protected said women against being approached concerning debauchery or indulgence in debauchery, to my mind that would be very strong evidence that the defendants knew that the surroundings and environment in which said women were to be placed would naturally lead to debauchery and immoral sexual relations.”

The rule of law is well settled that a federal judge may comment upon the evidence, and in this instance the court protected the defendant from a misconception of their duty by the jurors by particularly instructing that they were not bound by his, the court's, views.

In the case of *Parish v. United States*, 247 Federal 40, reading from page 44, the court said:

“It is not necessary to cite authorities in support of the proposition that the court had the right

to express an opinion as to the weight of evidence provided it ultimately submitted the facts to the jury to be passed on by them.”

In this instance there is no evidence before the court that the jury were misled by the court’s statement of its views, and undoubtedly if any member of the jury had been misled, counsel could and would have procured a statement from such juror to such effect to submit to the court.

In passing upon a case where error was alleged by the court admitting evidence and thereafter striking it out, the court, in the case of *Pennsylvania Company v. Roy*, 102 U. S. 451, quoting from page 456, said:

“The charge from the court that the jury should not consider evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. *The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine.* It should rather be, so far as this court is concerned, that the jury were influenced in their verdict by legal evidence. Any other rule would make it necessary in every trial where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval.”

In this case it is not to be presumed that the jury were misled, but rather is it to be presumed that they were men of ordinary discretion and followed the court's instructions and decided the case in every manner as prescribed by law.

We therefore respectfully submit that the verdict of the jury and the judgment of the lower court should be sustained.

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